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No. 00-

IN THE

Supreme Court of the United States

CHILDREN'S WORLD LEARNING CENTERS, INC.,

Petitioner,

v.

VICTORIA RIZZO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues in this case involve the conundrum faced by an employer who has objective evidence that an employee with a disability may present a danger to children in the employer's care but who cannot substantiate or refute that evidence because the employee refuses to provide necessary medical information.

The questions are:

1. Whether an employer who has reason to believe that an employee with a disability poses a danger to children in the employer's care is entitled, under the Americans With Disabilities Act, to temporarily reassign the employee while it investigates the threat posed by the employee's disability.

2. Whether an employee's refusal to cooperate with her employer's efforts to identify the limitations posed by the employee's disability and to determine whether those limitations create a danger to children in the employer's care bars the employee from recovery under the Americans With Disabilities Act.

3. Whether an employee with a disability bears the burden of proving that she does not pose a "direct threat" to others in conjunction with her burden of proving that she is a "qualified individual" under the Americans With Disabilities Act.

4. Whether an employee's transfer to other job assignments, resulting in *de minimus* reduction in hours worked, qualifies as a "demotion" under the Americans with Disabilities Act, in circumstances where the employee's subjective impression about the prestige of a particular job assignment is not objectively verifiable.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Children's World Learning Centers, Inc., identifies its parent company, Aramark Corporation, 1101 Market Street, Philadelphia, PA 19107. No publicly held company owns 10% or more of the stock of the petitioner.

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Children's World Learning Centers, Inc. d/b/a/ CWLC, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (*en banc*) is reported at 213 F.3d 209. The original panel opinion is reported at 173 F.3d 254. The findings of fact and conclusions of law of the district court are unreported.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Fifth Circuit Court of Appeals on May 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

Section 12111(8) of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*, provides:

> (8) **Qualified individual with a disability**
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are

> essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Section 12112 of the Americans With Disabilities Act provides:

> (a) **General rule**
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 12113(b) of the Americans With Disabilities Act provides:

> (b) **Qualification standards**
>
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

29 C.F.R. Pt. 1630.2(r) App. is reproduced in Appendix C due to its length.

STATEMENT OF THE CASE

A. Summary of the Pertinent Issues.

The specific issues are: (1) whether an employer, faced with a reasonable belief that an employee poses a danger to others, may temporarily reassign the employee pending receipt of necessary medical information; (2) whether an employee who refuses to engage in an interactive process to determine the limitations posed by her disability is barred from recovery under the ADA; (3) whether the burden of proof on the issue of direct threat falls on the employer or the employee when direct threat is raised as a qualification standard; (4) whether an employee who voluntarily resigns from employment despite the employer's request that alternatives be explored to maintain the employee's job, has a cause of action under the ADA; and (5) whether an employee's transfer to other job assignments regularly performed by other employees constitutes a "demotion" under the ADA when the alternative job functions are not objectively inferior.

B. Facts Material to Consideration of the Questions Presented.

Children's World, aware of respondent Victoria Rizzo's hearing impairment, first employed her in March, 1991. At that time, Rizzo assured Children's World that her hearing difficulty would not adversely affect her ability to supervise children. R. 36-37; 152; 183. In February of 1993, a parent, Sylvana Sandoval, came to Children's World to pick up her son, Andy. Observing Rizzo's interaction with her son, Sandoval noticed that Andy attempted in vain to get Rizzo's

attention. Although Andy repeatedly yelled out to her, Rizzo did not respond. R. 320. Sandoval approached the center director — Myra Ryan — and told her she was troubled by Rizzo's apparent inability to supervise children and was especially concerned that Rizzo's hearing disability compromised the safety of children who were daily passengers in the van driven by Rizzo. R. 322, 334.[1]

Ryan reported Sandoval's concern to the center director, who met with Rizzo and questioned her about Sandoval's trepidation. Rizzo admitted that she had suffered a decline in hearing acuity since the date of her employment. R. 82,160-61, 282. Ryan asked Rizzo whether she could hear a child in distress in the back of the van. R. 87; R. 254. Rizzo responded "I don't know." R. 87. Ryan also asked if Rizzo was able to hear an emergency siren. R. 251, 254; DX 51, p. 49. Ryan and the center's director asked Rizzo to have her audiologist prepare a report addressing whether Rizzo "was able to perform the duties of a van driver in a safe manner and also supervise children."[2] R. 162, 286; DX 24. In the interim, Rizzo was temporarily assigned to other duties at Children's World. R. 62, 72, 10-103, 164-165.

Rather than asking for confirmation that she could properly supervise children, Rizzo asked her audiologist for a letter

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1. Rizzo acknowledged a prior occasion in which *another* parent had complained that Rizzo did not respond when her child attempted to get her attention. R. 39-40.

2. The record shows Rizzo had appointments with her audiologist immediately prior to the incident with Sandoval's child and had, in fact, scheduled an appointment with the Texas Rehabilitation Commission on February 16, 1993. DX 51 p. 3.

pertaining to her ability to hear emergency vehicles.[3] Rizzo's audiologist, Jean Boller, supplied a letter dated March 11, 1993, which indicated Rizzo could hear an emergency siren. Boller's letter did not address Rizzo's ability to supervise children. DX 51 p. 50.[4]

Ryan explained to Rizzo that the letter failed to mention whether Rizzo was able to supervise the children. DX 27. On March 15, 1993, Ryan supplied Rizzo with an "Essential Job Function" list and asked Rizzo to have the audiologist evaluate whether Rizzo could perform the stated functions. R. 261; DX 29. Rizzo took that list to the Texas Rehabilitation Commission and informed her counselor that Children's World needed an evaluation of whether she could perform the required job tasks. The TRC counselor, Patricia Cruthirds, recalled her conversation with Rizzo, which took place April 1, 1993, as follows:

> Vicki said her employer is aware she is requesting assistance from TRC in purchasing new hearing aids. She said her employer asked for me to review a list of critical job elements (see file) and comment on Vicki's ability to perform these job elements. . . .
>
> * * *

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3. The record supports Ryan's testimony. Jean Boller's Beltone Audiology Center records pertaining to Rizzo show that Rizzo asked her for a "letter for her employer stating she can hear ambulance." DX 51, p. 3.

4. Unbeknownst to Children's World, on March 3, 1993, Rizzo evaluated her own disability and concluded that her hearing impairment had advanced to such a level that she had difficulty "understanding what is being said when back is turned; has trouble talking over the phone; has trouble associating sound with location . . ." DX 45 p. 17.

> I explained to Vicki that I do not feel comfortable making this kind of statement without an on site visit — possibly with an audiologist. She said they had asked this some time ago and had not mentioned it since that time. She does not want to "rock the boat" and will wait to see if they request this type of information again.

DX 45, p. 15.

Only days before Ryan supplied Rizzo with the "Essential Job Function" list, Rizzo's audiologist had performed an examination and came to troubling conclusions regarding Rizzo's hearing impairment. Jean Boller's examination demonstrated that Rizzo heard the word "*death*" as "luck"; the word "*match*" as "mop"; the word "*burn*" as "then"; the word "*pain*" as "chain." R. 390-391; DX 51, p. 55.[5] Approximately two weeks after Boller's examination, Dr. Felix R. Poretelli examined Rizzo and concluded that Rizzo was suffering from "profound bilateral congenital familial sensorineural hearing loss" which was "not amenable to medical or surgical improvement." DX 50 pp. 63-64. He observed that Rizzo's ability to discriminate speech required her to face the speaker. *Id.*[6]

Several weeks later, Rizzo informed Ryan that the audiologist could not evaluate her ability to perform essential

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5. Boller and Watson's examinations of Rizzo were conducted under scientific tests recognized as valid in the field of audiology. R. 387.

6. Dr. Sean Connolly diagnosed Rizzo as follows: "Profound hearing loss. Must be able to visually observe the lip movements of a speaker. May miss keywords, qualifiers or important bits of information with messages which are presented orally." R. 400.

job functions without an on-site evaluation. Ryan informed Rizzo on April 20, 1993 that the audiologist was welcome to conduct that observation. R. 198-200; 288; 293; DX 28. On April 22, 1993 — two days after Ryan authorized the on-site evaluation — Rizzo again met with Patricia Cruthirds. At that time, Rizzo did not mention Ryan's recent authorization of the evaluation. R. 372. Rizzo again met with Cruthirds in May and, again, suppressed the fact that Ryan had approved the evaluation. R. 372.[7] Prior negative assessments of Rizzo's hearing acuity may well explain why Rizzo did not insist on an on-site evaluation when Children's World was purported to have later remarked that an evaluation was no longer necessary.

On May 19, 1993, having failed to report the results of the prior audiology examinations, Rizzo told Cruthirds that she had decided to resign from Children's World. DX 45 p. 9. One day later, Rizzo voluntarily resigned from the Center. R. 114. She testified that her mind was "made up" and that "nothing could be done" to persuade her to stay. R. 74; 105; 112. She informed Ryan and the center's director that her decision was irreversible. In a letter to parents, Rizzo explained that the reason for her departure was "career advancement." R. 128-129.

Not once had Rizzo ever requested that Children's World do anything to accommodate her disability. R. 107, 135. Rizzo never lost her full-time benefits while reassigned to other duties. R. 89.

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7. Although she testified that Ryan said the evaluation was no longer necessary, Rizzo did nothing further to assure Children's World that she could safely supervise the children. R. 96-97.

C. Proceedings Below.

Victoria Rizzo brought suit against Children's World Learning Centers, Inc. ("Children's World") under Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* Rizzo claimed that Children's World improperly suspended her from transporting children in the company's van. In a prior proceeding, the district court granted summary judgment in favor of Children's World. Rizzo appealed that judgment to the Fifth Circuit, which reversed the summary judgment and remanded the cause for trial. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (*Rizzo I*). The court concluded there were genuine issues of fact concerning (1) whether Rizzo was a "direct threat" and (2) whether Children's World took an adverse employment action against Rizzo. *Id.* at 764, 765.

The case was tried to a jury. The jury found Children's World liable for violation of the ADA and assessed "mental anguish" damages in the amount of $100,000. The district court found that Rizzo suffered lost wages in the amount of $182.20 and awarded judgment for Rizzo in the amount of $100,182.20 plus attorneys fees. Children's World appealed the district court's judgment to the Fifth Circuit.

A three-judge panel of the Fifth Circuit affirmed the district court's judgment, with one judge dissenting. The majority held that Children's World bore the burden of proving that Rizzo was a direct threat to the safety of the children and that Children's World was not entitled to a judgment as a matter of law because it did not conclusively prove that Rizzo was a direct threat. *Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254, 258-260 (5th Cir. 1999) (*Rizzo II*). The dissent observed that there

are conflicts not only among the courts of appeals, but within the statute and regulations themselves, regarding who has the burden of proof on the issue of direct threat. The dissent would have reversed the district court's judgment and granted Children's World judgment as a matter of law on the following grounds: (1) the evidence established that Rizzo was responsible for a breakdown in the interactive process necessary to determining the extent of any limitations created by her disability; (2) an employer who is entrusted with the care and safety of others is authorized under the ADA temporarily to reassign the employee to other tasks while investigating the extent of the employee's limitations. *Id.* at 267-270.

Children's World's petition for *en banc* rehearing was granted on August 27, 1999. A majority of the *en banc* court affirmed, with three judges dissenting. The majority held that Children's World waived error by failing adequately to object to the district court's allocation of the burden on direct threat, even though *Rizzo I* dictated that such an objection would be futile. *Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209, 212-213 (5th Cir. 2000) (*en banc*). The court further found that Rizzo cooperated with Children's World's efforts to investigate the scope of Rizzo's threat to the children, despite Rizzo's emphatic pronouncement (prior to voluntarily resigning) that Children's World could do "nothing" to keep her in its employ. *Id.* at 213-214; *see also* dissent to panel's disposition in *Rizzo II*, 173 F.3d at 265 (Weiner, dissenting).

The dissent disagreed with the majority's assessment of the evidence and application of the ADA:

> The result in this case is facially absurd: An employee whose numerous duties as assistant

> teacher and administrative aid include driving small children in the school van is asked temporarily not to drive until she can show that her poor hearing does not endanger her young passengers. For this purportedly reprehensible deed, done in the interest of child safety, the school must pay the impaired employee $100,000 plus attorney's fees.
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> * * *
>
> Because neither temporary suspension nor even permanent removal of driving duties alone qualifies as a demotion, and because she did not show any other disability-motivated adverse employment action, Rizzo failed to present a prima facie case of liability under the ADA. This court should therefore reverse and render judgment as a matter of law in favor of CWLC.
>
> * * *
>
> To place the burden [of direct threat] on the employer is to hold — absurdly, in our view, —that unsafe execution of job duties nevertheless constitutes adequate performance. This approach effectively rewrites the ADA to require an employee merely to prove his ability to "perform the essential functions of the employment position," § 12111(8), without regard "to the health or safety of other individuals in the workplace," § 12113(b). As a matter of statutory construction if nothing else, such a rule is untenable.

Rizzo v. Children's World Learning Centers, Inc., 213 F.3d at 215, 217, 218. The dissent also noted that error was preserved

and that, to the extent a contrary proposition is advanced, *Rizzo I*'s opinion (which *mandated* placing the burden on the employer) excused any omission in that regard. *Id.* at 223 ("Objection here would have been similarly fruitless — and thus similarly excused — for we had just recently sent the court direct instructions regarding burden of proof in *Rizzo I*").

REASONS FOR GRANTING THE WRIT

The ADA's regulations specifically authorize an employer to require that an employee not pose a direct threat to the health or safety of others. When a valid question arises regarding an employee's potential threat, the ADA directs the employer to gather information from the individual and receive opinions of medical doctors, rehabilitation counselors or physical therapists who have expertise in the disability or direct knowledge of the individual's capacity to perform the job function safely. The nature of that inquiry requires cooperation of the employee, particularly where the employer has no independent means to evaluate objectively the dimensions of any peril. During this fact-gathering process, an employer must be permitted temporarily to assign to other employees those duties in which the safety of others is entrusted, while seeking the employee's cooperation to determine the extent of the threat. Elimination of that option would compel an employer to expose others to the threat of physical harm.

The Fifth Circuit has eliminated that option. In the Fifth Circuit's view, an employer must abide the danger if the employee's disability has yet to actually manifest itself in harm to others. The Fifth Circuit's construction, like Russian roulette, is contingent on a fortuity. But here innocent wards

are left without a choice — the Fifth Circuit's holding requires that the employer permit an employee to continue transporting as many as 24 children in a company van, despite evidence (partially confirmed by the employee herself) that the employee's ability to hear has so deteriorated that she may fail to comprehend a frantic plea for help. No reasonable construction of the ADA compels that result.

The ADA recognizes that an employee who seeks reasonable accommodation of a disability must assist her employer in reaching that accommodation. This case provides an opportunity for the Court to employ the same reasoning to require that an employee cooperate with her employer to determine the extent of a threat ostensibly posed by her disability. The Fifth Circuit acknowledged that the employee bore this responsibility, yet failed to attach significance to the respondent's suppression of objective medical evidence and her resistance to an audiologist's on-site evaluation — both of which directly bore upon whether she could adequately supervise children while driving the company van.

Even assuming the law forces an employer to choose between certain liability for alleged discrimination because of a temporary reassignment and adopting cautionary measures to protect those in its care from an apparent threat, employers and employees across the country have an interest in knowing how the burden of proof is allocated. Currently, the answer depends upon where the lawsuit is tried. In the Fifth and Ninth Circuits, the employer has the burden of proving the existence of a direct threat. In the First and Eleventh Circuits, the employee bears that burden. The issue is ripe for determination by the only Court with authority to resolve this hopeless conflict.

Finally, the Fifth Circuit's judgment is based in large part on the respondent's subjective interpretation that driving a van carries more prestige than administrative or teaching functions at Children's World. As a matter of law, however, respondent's temporary reassignment to functions shared by all employees at the workplace does not state a valid basis for recovery under the ADA.

I.

CHILDREN'S WORLD PROPERLY BALANCED THE NEED TO PROTECT THE CHILDREN AGAINST RIZZO'S INTEREST IN DRIVING THE COMPANY VAN.

A. Children's World had a duty to investigate the threat.

The courts encourage an employer who has reason to believe that an employee's disability imposes limitations on her ability to perform her job to investigate the extent of those limitations, at least where they impact the safety of others. For example, the disabled employee in *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), was responsible for dispensing medication to people in her care who were suffering from autism, retardation, and behavioral disorders. The employer (Amego) became concerned about her ability to perform this function safely because, within the space of six weeks, she twice attempted suicide by taking an overdose of medication. There were also indications that some of the clients may have been improperly medicated. Amego attempted to obtain a professional opinion on the disabled employee's ability to resume her duties. *Id.* at 140. The court of appeals stated:

> We also credit the deliberative process through which Amego made its decision. It sought additional input, including that from Guglielmi's medical advisors, and considered other information before reaching its decision. This deliberative process undercuts any argument that the employer based its decision as to qualifications on stereotypes about disability.

Id. at 146; *see also Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) (employer not liable where employee obstructed effort to obtain information from doctor).

Conducting an appropriate investigation and obtaining information from medical professionals is also encouraged by the very definition of "direct threat." The regulations provide that

> [t]he determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. Pt. 1630.2(r).

Children's World, like Amego, made a good faith effort to determine Rizzo's ability to safely transport children in the school van once the issue was raised by a concerned parent. Clearly it was not only entitled to conduct such an

investigation, its obligation to the children *required* it to do so. Further, because the safety of the children was at the heart of the issue, the circumstances virtually required Children's World to suspend Rizzo from driving the van until any question regarding her ability was resolved. No other course of action would have been reasonable. Again, *Amego* is instructive:

> Amego also operated in a context which added weight to the risks it thought Guglielmi posed. Amego is licensed by two state agencies and is required to take steps to assure the safety of its patients. If a single client had been harmed from misuse of medication, then Amego stood the risk of losing its licenses and its ability to care for any of its clients.

Id. at 147.

Similarly, Children's World is a licensed day care center and is obligated by law to assure the safety of the children in its care. It could not tolerate the risk of even a single child being harmed because of Rizzo's inability to hear and distinguish voices in the van. In weighing its alternatives, Children's World recognized, as would any objective observer, that the risk of hurting Rizzo's feelings by temporarily suspending her from driving the van paled in comparison to the risk of serious injury or death to a child which could result from Rizzo's inability to promptly recognize and react to an emergency situation. Children's World had a moral, legal, and contractual obligation to give priority to the safety of the children. It is irrational that Children's World should suffer liability for giving temporary priority to children's safety while investigating the extent of the undisputed risk.

B. Whether Rizzo could safely transport the children was a reasonable concern.

Children's World's concern over whether Rizzo's hearing impairment limited her ability to safely transport children in the school van was not unreasonable or unprecedented. Safety issues involving hearing impaired drivers are the subject of a number of court opinions. *See Buck v. United States Dept. of Trans.*, 56 F.3d 1406 (D.C. Cir. 1995) (discussing Federal Highway Administration regulations requiring drivers of commercial motor vehicles in interstate commerce to be able to hear); *Erie Ins. Co. v. Foster*, 560 A.2d 856 (Pa. 1989) (hearing impairment is clearly condition material to risk in seeking auto insurance); *Giampa v. Commonwealth*, 492 A.2d 504 (Pa. 1985) (upholding recall of school bus driver's license because of hearing loss); *State Division of Human Rights v. Averill Park Cent. School Dist.*, 388 N.E.2d 729 (N.Y. 1979) (school bus driver's loss of hearing is physical impairment relating to ability to drive).

Because the ability of a hearing impaired driver to safely transport children is a legitimate concern, and because Children's World is obligated by law to assure the safety of the children in its care, public policy prohibits imposing liability for temporarily suspending Rizzo's driving duties while it determined whether the children were, in fact, safe.

II.

RIZZO'S REFUSAL TO ASSIST CHILDREN'S WORLD IN DETERMINING THE LIMITATIONS POSED BY HER DISABILITY PRECLUDES HER RECOVERY UNDER THE ADA.

A. The relevant statutory provisions, regulations, and guidelines.

The ADA provides that "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" may be unlawful discrimination. 42 U.S.C. § 12112. EEOC regulations state:

> [t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3). Similarly, EEOC guidelines explain that employers need only make reasonable accommodation to the limitations resulting from the disability of a qualified individual with a disability that are known to the employer. 29 C.F.R. Pt. 1630.9 App. Again, the EEOC emphasizes that determination of an appropriate accommodation "is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." *Id.*

B. A disabled employee must assist the employer in determining her limitations.

The statute, regulations, and guidelines make clear that an employer is entitled to information concerning the precise limitations that result from an employee's disability. Indeed, the Fifth Circuit previously recognized the importance of determining the extent of an employee's limitations:

> For purposes of proving ADA discrimination, it is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of that disability. This distinction is important because the ADA requires employers to reasonably accommodate limitations, not disabilities.

Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996).

An employee cannot recover under the ADA if the limitations imposed by a disability are "uniquely within the knowledge of the employee and his health-care provider" and the employee does not assist the employer in determining the extent of those limitations (*i.e.*, if she fails or refuses to engage in the flexible, interactive process contemplated by the regulations). *See id.*

C. Rizzo obstructed Children's World efforts to determine extent of her limitations.

The record establishes that Rizzo suffered some limitation as a result of her hearing impairment; there is uncontroverted evidence that a child calling her from behind was unable to get her attention in the classroom. What was not known, however, was the extent to which her hearing impairment limited her ability to safely transport children in the van. When asked whether she would be able to hear a child in distress in the back of the van, she responded that she did not know. That response gave both parties reason to suspect that Rizzo's hearing impairment might limit her ability to safely transport the children and prompted Children's World to seek further information regarding any such limitation. It also gave Children's World a reasonable basis to temporarily remove Rizzo from driving the van during the course of its investigation.

The limitations arising from Rizzo's disability, specifically in the context of her ability to safely transport the children in the van, were "uniquely within the knowledge of the employee and [her] health-care provider." *See Taylor*, 93 F.3d at 165; *see also Beck*, 75 F.3d at 1136 (information of type that can only be provided by party). For this reason, rather than trying to engage in its own amateur evaluation of Rizzo's limitations, Children's World reasonably attempted to obtain this information from a qualified source — Rizzo's health care providers. Rizzo, however, did not cooperate in this effort. Although Children's World requested specific information assessing her ability to safely transport the children, Rizzo failed to submit to Children's World the

results of very recent examinations and intentionally delayed an on-site observation by her audiologist.[8]

D. Rizzo is not entitled to recover under the ADA because she is responsible for the breakdown in the interactive process.

The record conclusively establishes that Rizzo is at fault for the breakdown in the interactive process required under the ADA. Children's World reasonably took the most limited action possible during the course of its investigation to determine the scope of Rizzo's limitations — temporarily suspending Rizzo from the one aspect of her job that caused concern for the safety of the children. It was precluded from determining whether that suspension should be lifted or made permanent by Rizzo's failure to provide necessary medical information and by her subsequent resignation. Having obstructed the interactive process, Rizzo cannot now recover under the ADA.

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8. It is also significant in this case that Children's World attempted to cooperate with Rizzo until the very end of their employment relationship. Rizzo was not terminated — she quit. Even at the point of her exit interview, Children's World asked Rizzo what could be done to keep her in its employ. Rizzo responded that nothing could be done; she was determined to quit regardless of what action Children's World might take. This not only constitutes a failure to cooperate, but a failure to request reasonable accommodation, which also bars ADA recovery. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1393-95 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994).

III.

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF WHO BEARS THE BURDEN OF PROOF OF DIRECT THREAT.

The Eleventh Circuit has unequivocally held that "[t]he employee retains at all times the burden of persuading the jury . . . that he was not a direct threat." *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert denied*, 519 U.S. 1118 (1997); *see also* 29 C.F.R. § 1630.15(b)(2) (providing that "direct threat" is a "qualification standard"). The First Circuit has held that the employee bears the burden of proving that she is not a direct threat when her essential job functions necessarily implicate the safety of others. *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997). On the other hand, the Ninth Circuit has held that the employer bears the burden of proving direct threat, at least insofar as direct threat is raised as an affirmative defense. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). This Court should resolve the critical question of who bears the burden of proof on the issue of direct threat.

IV.

EVEN IF THE COURT WERE TO IMPOSE THE BURDEN OF PROVING DIRECT THREAT ON CHILDREN'S WORLD, RIZZO IS NOT ENTITLED TO RELIEF.

As discussed in detail above, Rizzo's failure to engage in the necessary interactive process prevented Children's World from determining whether she was a direct threat.

She cannot now complain that Children's World failed to prove that which she prevented it from proving. But even more importantly, the limited action taken by Children's World required only that it have a reasonable belief that Rizzo posed a danger to the children which required temporary action while that belief was investigated. Because Rizzo quit before that investigation was completed and before Children's World could determine what appropriate, permanent action to take, Children's World is relieved of any burden to prove direct threat.

V.

RIZZO FAILED TO PRESENT A *PRIMA FACIE* CASE OF LIABILITY UNDER THE ADA.

Even if Rizzo proved that she is a "qualified individual with a disability," it was her further burden to prove that Children's World took an adverse employment action *solely* because of her disability. *Rizzo*, 84 F.3d at 764. The employment actions at issue are: (1) removing Rizzo from driving the school van; (2) reducing her hours; (3) scheduling her to work a split shift; and (4) assigning her to work in the kitchen.

The evidence clearly establishes that the second, third, and fourth actions were not taken solely because of Rizzo's disability. The reduction in hours was due to fluctuating enrollment, and the split shift was to accommodate Rizzo's requests that she not teach school age children and that she not be alone in a classroom for more than thirty minutes at a time. Her assignment to kitchen duties was neither unique nor adverse as all of the employees at the school assisted with food preparation. Thus, the only possible adverse

employment action was removal from driving the school van.[9]

Rizzo cannot recover under the ADA because of Children's World's suspension of her driving duties. Driving the van is not an essential element of her job. Therefore, being temporarily relieved of that duty is not an adverse employment action unless it resulted in Rizzo having "*significantly diminished* material responsibilities." *See Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). The evidence is undisputed that Rizzo suffered no loss of stature by virtue of being assigned the task of teaching and/or assisting with other functions at Children's World. Driving the van was never considered a privilege, so a restriction from driving the van could not be considered a demotion. R. 197-198; 288. There was no additional pay given for driving students in the van. R. 145. Rizzo did not lose her full-time benefits as a result of the realignment of her duties. R. 64-65; 89; 204. Moreover, the evidence is clear that changes in hours at Children's World were attributable primarily to the normal seasonal fluctuations experienced by day-care workers generally.[10] R. 210-214.

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9. In fact, the first liability question to the jury specifically refers only to Children's World's action in removing Rizzo from driving the van.

10. Daycare enrollment differs in the summer and during the school year. Some children who are enrolled during the school year may stay at home during the summer or may attend summer camps instead. R. 185.

CONCLUSION

No reasonable construction of the Americans With Disabilities Act would compel an employer to place lives in jeopardy while it investigates whether an employee's disability poses a direct threat. An employer is not only permitted but also encouraged by the ADA to obtain objective data confirming or dispelling the prospect that an employee's impairment may threaten physical harm to those whom the employer is entrusted to protect. When an employee impedes that effort, she forfeits any right of recovery under the ADA. The absence of uniformity among the circuits on these questions requires resolution by this Court. Accordingly, Children's World requests that this Court grant its petition and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MAY 26, 2000

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-50367

VICTORIA RIZZO,

Plaintiff-Appellee,

VERSUS

CHILDREN'S WORLD LEARNING CENTERS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

DAVIS, Circuit Judge.

We took this case en banc primarily to determine whether, in this fully-tried case, the district court erred in the instructions it gave to the jury in Victoria Rizzo's action under the Americans with Disabilities Act and, secondarily, whether the record supports the verdict. The jury, in response

to special interrogatories, rendered a verdict in favor of Ms. Rizzo. After carefully reviewing the record, we conclude that the district court committed no plain error in submitting this case to the jury and that the evidence amply supports the verdict. We therefore affirm the judgment of the district court.

I.

Appellee, Ms. Victoria Rizzo, was employed by appellant, Children's World Learning Centers, Inc. (CWLC), as a teacher's aid. One of her duties was driving a van transporting children to and from school. Ms. Rizzo had a hearing impairment which she disclosed to CWLC before she was hired. After observing Ms. Rizzo in the classroom, a parent expressed concern about whether Ms. Rizzo's hearing impairment placed the children at risk while they were riding as passengers in Ms. Rizzo's van. Shortly thereafter, CWLC relieved Ms. Rizzo of her driving duties because of their concern that her hearing impairment prevented her from safely driving the van and supervising the children in the van.

The district court initially granted summary judgment in favor of CWLC on grounds that the employer took the personnel action for a legitimate non-discriminatory reason and Rizzo failed to show that this reason was pretextual. Ms. Rizzo appealed to this court and we concluded that issues of fact were presented which required resolution at trial. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (*Rizzo I*). We stated that "[w]hether one is a direct threat [to the safety of herself or others] is a complicated,

fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm." *Id.* at 764. On the burden of proof, we stated that "[a]n employee who is a direct threat is not a qualified individual with a disability. As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." *Id.*

On remand, the case was tried to a jury, which rendered a verdict in favor of Ms. Rizzo. The district court entered a judgment on the verdict and a divided panel affirmed. *Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254 (5th Cir. 1999) (*Rizzo II*). The dissent took the position that the district court erred in two respects: first, in placing the burden of proof on the defendant to establish that Ms. Rizzo was a direct threat to the children she was transporting in the van, and; second, in failing to grant defendant's motion for judgment as a matter of law on grounds that the plaintiff failed to produce sufficient evidence to support the implicit jury finding that she engaged in the interactive process to provide information to the employer about the extent of her disability. We took this case en banc to consider these two issues.

II.

A.

CWLC first challenges the district court's charge to the jury, explaining which party had the burden of establishing that Ms. Rizzo was a direct threat to her student passengers.

Appendix A

In charging the jury, the district court first instructed the jury that the plaintiff, Rizzo, had the burden of proving the essential elements of her claim. The court explained that this required the plaintiff to prove that she was a qualified person with a disability or a person who "can perform the essential functions of the employment position . . . and who does not pose a 'direct threat' to the health and safety of herself or others." Neither party objected to this charge and no argument is advanced suggesting that it is erroneous.

The court's next instruction explained the employer's defense that Ms. Rizzo was removed as the school van driver because CWLC thought she posed a direct threat to the health and safety of herself and others. The district court — faithful to our remand order in *Rizzo I* — charged that the "defendant has the burden to prove by a preponderance of the evidence that a direct threat exists." No objection was made to this charge.[1]

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1. The dissent disagrees with our reading of the record and takes the position that the defendant objected to the court's instruction placing the burden of proof on the defendant to establish its affirmative defense of "direct threat." Some background is helpful to understand why the objection the defendant points to on pages 452 and 453 (Volume V) of the record does not preserve this issue for appeal.

The direct threat issue was presented in the district court in two ways: First, plaintiff was required to prove, as one of the elements of her case, that she was a "qualified individual with a disability." The court defined this phrase as one who can perform the essential functions of the employment position without posing a "direct threat" to the health or safety of herself or others. The court

(Cont'd)

Appendix A

The question of who bears the burden of establishing that an individual's disability poses a direct health or safety threat to the disabled employee or others is not a simple one. A number of cases either hold or suggest that direct threat is an affirmative defense on which the defendant ordinarily has the burden of proof.[2] Other cases hold to the

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instructed the jury that the plaintiff had the burden of proving this and other elements of her case. Second, the defendant asserted an affirmative defense that plaintiff was removed from driving the van because her employment in this capacity posed a "direct threat" to the health or safety of others. The court charged that the defendant had the burden of proving this affirmative defense.

The defendant's only objection at trial that related to the defendant's "direct threat" defense was to the court's failure to require the jury to answer a separate interrogatory on this defense. The defendant was concerned that without a separate jury issue on the defendant's affirmative defense, the jury would become confused and require the defendant to prove an element of the plaintiff's case — that Rizzo was a "qualified individual with a disability." Defendant makes a very different argument on appeal. Instead of arguing that the court should have given the jury a separate interrogatory on the defendant's affirmative defense, it argues that the court erred in assigning the burden of proof to it to establish this affirmative defense. The defendant's objection did not complain of the court's burden of proof instruction and this issue was not preserved for appeal.

2. *See EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-85 (7th Cir. 1995); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247-48 (9th Cir. 1999); *Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088-1089 (10th Cir. 1997); *see also* 29 C.F.R. § 1630.15(b)(2).

contrary.[3] Because neither side objected to either of the district court's instructions described above, we review this challenge for plain error.

As we stated in *Highlands Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 27 F.3d 1027, 1031-1032 (1994):

> Federal Rule of Civil Procedure 51 is even more restrictive than Criminal Rule 52(b); indeed, one circuit holds that it allows no new attacks on instructions on appeal. We thus agree with the Sixth Circuit that "[t]he principles and decision enunciated in *Olano* apply *a fortiori* in the civil context where courts pay less strict attention to procedural protocol." Olano augments this court's longstanding rule that reversal for plain error is "not a run-of-the-mill remedy" and will occur "only in exceptional circumstances to avoid a miscarriage of justice."

In allocating the burden of proof to the defendant to establish its defense, the district judge carefully followed the marching orders we gave him in *Rizzo I*. In this circumstance we are therefore unable to say the district court committed error at all. But, if we assume that the district court somehow committed error, it certainly was not plain or "obvious" error and we need not resolve the burden of proof issue raised for the first time on appeal.[4]

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3. *Moses v. American Nonwovens, Inc.* 97 F.3d 446, 447 (11th Cir. 1996); *EEOC v. Amego, Inc.*, 110 F.3d 135, 142-44 (1st Cir. 1997).

4. It is unclear from the statutory scheme who has the burden on this issue. It may depend on the facts of the particular case. The (Cont'd)

Turning to the sufficiency question, our review of the record persuades us that the evidence amply supports the jury's finding that Rizzo was able to drive the van safely and did not pose a direct threat to her passengers. Ms. Rizzo produced evidence of her safe driving history and unblemished history of supervising the children without incident. Rizzo also produced evidence that CWLC evaluated her skills and gave her a driving score in excess of the minimum needed to be able to drive the van. She was experienced in life saving procedures and possessed all licenses required by the State of Texas.

Rizzo's own testimony supported the conclusion that she had no difficulty supervising children on the bus. She testified about how she used the van's internal mirrors and how she kept order on the bus. The evidence was clearly sufficient to support this jury finding.

B.

CWLC argues next that Ms. Rizzo failed to communicate with it to provide sufficient information about her disability

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EEOC suggested at argument that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but, where the alleged threat is not so closely tied to the employee's core job duties, the employer may bear the burden. *See also EEOC v. Amego*, 110 F.3d 135, 144 (1st Cir. 1997). None of these issues were raised in the district court and all we decide today is that the district court did not commit plain error in its charge.

to allow the employer to evaluate whether she could perform the job safely.

The district court — as part of its charge on reasonable accommodation — explained the obligations of the employer and employee to communicate with each other about the employee's disability and how that disability relates to job performance.[5]

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5. The court charged as follows:

> For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation.
>
> Where the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the process. This determination must be made in light of the circumstances surrounding a given case. If the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possesses, the employer has made a good faith effort of accommodation.
>
> An employer does not have the responsibility to go in search of information, such as medical advice, that is uniquely in the hands of the employee, particularly when the employee appears not to have been particularly responsive to requests for further information.

Appendix A

In rendering a verdict for the plaintiff, the jury implicitly found no inadequate responsiveness by Ms. Rizzo in providing necessary information about her condition. No objection was made to this charge so the question narrows to whether the evidence is sufficient to support this implicit finding. Viewing the evidence in a light favorable to the verdict, our review of the record persuades us that the evidence is sufficient.

It is undisputed that before the parent expressed concern that Ms. Rizzo could not safely drive the van and supervise the children, CWLC knew a number of important facts: Ms. Rizzo possessed a commercial driver's license; she had taken and passed all of the written and performance criteria established by CWLC relating to van driving; and finally, no one had ever reported to appellant that Ms. Rizzo had failed to safely drive the van and supervise the children. In fact, the parent who expressed concern about Ms. Rizzo did not observe her engaging in any unsafe practices.

In response to the statement made by the concerned parent, appellant's director, Ms. Ryan, told Ms. Rizzo that she was concerned about whether Ms. Rizzo could hear a siren and whether she could hear a child choking in the van. Ms. Ryan told Ms. Rizzo that she could no longer drive the van until CWLC satisfied itself that she could do it safely. Following this meeting, Ms. Ryan indicated to Ms. Rizzo that CWLC would have an audiologist test Ms. Rizzo at the school. Despite inquiry by Ms. Rizzo, CWLC never arranged for such a test. Approximately three weeks later Ms. Rizzo went to her own audiologist. After testing her hearing, the audiologist reported that Ms. Rizzo should have no difficulty

hearing a siren. Ms. Rizzo delivered the audiologist's report to Ms. Ryan and told her to call the audiologist if she had any questions. When Ms. Rizzo asked Ms. Ryan whether CWLC planned to have an audiologist test her at the school, Ms. Rizzo received no definitive answer. Ms. Ryan finally told Ms. Rizzo that the matter was in the hands of Ms. Ryan's superior, Claudia Adame. When it became apparent to Ms. Rizzo that CWLC planned to take no further steps to resolve the question of whether her hearing impairment affected her ability to drive the van and supervise the children in the van, she resigned.

We are satisfied that the jury was entitled to conclude that Ms. Rizzo adequately communicated with CWLC about her hearing impairment and the effect of this impairment on her ability to safely drive the school van.

III.

For the above reasons, the judgment of the district court is affirmed.[6]

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6. The dissent takes the position that Rizzo's proof failed as a matter of law to establish that Rizzo suffered an adverse employment action. We agree with the panel opinion (*Rizzo II*) that a reasonable jury could have concluded that when Rizzo was prohibited from driving the van, her hours were reduced by about 25% causing a similar reduction in her pay. This is sufficient evidence to establish an adverse employment action.

Appendix A

JONES and SMITH, Circuit Judges, with whom WIENER, Circuit Judge, joins, dissenting:

The result in this case is facially absurd: An employee whose numerous duties as assistant teacher and administrative aid include driving small children in the school van is asked temporarily not to drive until she can show that her poor hearing does not endanger her young passengers. For this purportedly reprehensible deed, done in the interest of child safety, the school must pay the impaired employee $100,000 plus attorney's fees.

Congress surely could not have intended such an outcome. We respectfully dissent.

I.

We agree with the majority to the extent that it resolves thorny substantive legal issues arising under the ADA. That is, the en banc majority, like the panel dissent, correctly concludes that the ADA requires employers and employees to engage in a good faith, interactive process of information exchange with regard to an employee's disability and the availability of reasonable accommodations. An employee who unreasonably fails to provide the employer with such information is thus precluded from pursuing an ADA action against his employer.

We disagree, however, with the majority's ultimate decision to affirm the judgment based on the verdict. The majority does so not only in the face of serious doubts about whether Rizzo provided adequate information concerning the

scope of her disability to CWLC, but also despite a fatal flaw in her *prima facie* case.

Specifically, Rizzo failed, as a matter of law, to prove that CWLC took any adverse employment action because of her disability, a necessary element of an action under the ADA. The majority, agreeing with the panel in *Rizzo II*,[1] dispenses with this issue in a single, perfunctory footnote. We would reverse and render on the ground that Rizzo did not present sufficient evidence of an adverse employment action to support the verdict.

We additionally are troubled by the majority's avoidance of substantive discussion of *Rizzo I*,[2] in which the panel assigned the burden of proof to the *employer* to show that an employee cannot safely perform an essential job function because of his disability and thereby poses a direct threat to the health or safety of others. *Rizzo I* was incorrectly decided. The majority, however, altogether avoids this sticky question — admittedly made more difficult by facially inconsistent provisions of the ADA — by asserting that CWLC failed to raise the proper objection in district court. As we will explain, that position is untenable, because CWLC did adequately object.

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1. *See Rizzo v. Children's World Learning Ctrs., Inc.*, 173 F.3d 254, 260 (5th Cir. 1999) ("*Rizzo II*").

2. *See Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) ("*Rizzo I*").

Appendix A

II.

The ADA does not prohibit *all* discrimination on the basis of disability, but only discrimination that produces an adverse employment action. The Act expressly prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual *in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*"[3] Therefore, "[t]o establish a prima facie case under the ADA one must show: (1) that he has a disability; (2) that he was qualified for the job; and (3) that he was *subject to an adverse employment decision because of his disability.*"[4]

Rizzo not only voluntarily resigned her position, but did so over CWLC's pleas for her to stay and inquiries as to what it might do to keep her.[5] Rizzo alleges, however, that before her voluntary resignation, she was demoted; she presents two theories to establish her demotion.

First, she maintains that she lost wages from having to work a reduced, split schedule, and felt stigmatized by her new duties.[6] These actions may constitute a demotion, but

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3. 42 U.S.C. § 12112(a) (emphasis added).

4. *Ivy v. Jones*, 192 F.3d 514, 516 (5th Cir. 1999) (emphasis added).

5. *See Rizzo II*, 173 F.3d at 265 (Wiener, J., dissenting).

6. *See id.* at 260-61; *id.* at 271 (Wiener, J., dissenting).

an employee additionally must show that he was demoted *because of his disability*.[7] Rizzo made no such showing. To the contrary, she admitted that her new duties "were duties shared by all CWLC employees to varying degrees" and that "others also worked split shifts."[8]

The sole employment action for which there was evidence of impermissible discriminatory motive was CWLC's temporary suspension of Rizzo's driving duties.[9] That temporary employment action was taken, as CWLC readily concedes, as the direct result of parents' complaints regarding Rizzo's hearing disability in the context of express concerns for child safety. But suspension — or even permanent removal — of driving duties alone does not constitute a demotion, for that employment action, alone, did not cause a change in pay or benefits.[10] And although

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7. *See Ivy*, 192 F.3d at 516.

8. *Id.* at 271 (Wiener, J., dissenting). *See also id.* at 260.

9. *See id.* at 261; *id.* at 271 (Wiener, J., dissenting).

10. The majority incorrectly attributes a reduction in Rizzo's hours — and thus, her wages — to the suspension of her driving duties. In fact, Rizzo's wages were not reduced because of her hearing difficulties. When CWLC suspended her driving duties, CWLC simply reassigned her to perform other tasks to make up for those hours. Indeed, Rizzo never lost her status as a full-time employee, but continued to enjoy all the benefits of full-time employment.

Rizzo responds by asserting that her work hours nevertheless diminished. The dispositive issue, however, is not whether she worked less hours, but *why*. The record shows that it was *ordinary*

(Cont'd)

there need not be a "decrease in pay, title, or grade" to constitute a demotion, an employee at least must show that his reassignment of duties "proves objectively worse — such as being less prestigious or less interesting or providing less room for advancement."[11] "[A] 'bruised ego' is not enough."[12]

A reasonable juror could not conclude that the elimination of van-driving responsibilities from the duties assigned to an assistant teacher and administrative aide constitutes a demotion. There is nothing inherently prestigious or interesting or career-advancing about driving a van full of children.[13] Rizzo therefore cannot make the

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(Cont'd)
business fluctuations resulting from the seasonal nature of daycare work — and *not her loss of driving duties* — that caused Rizzo to receive reduced hours.

The weeks immediately following Rizzo's suspension of driving duties happened to coincide with CWLC's lowest period of staffing need. Rizzo fails to rebut CWLC's explanation with sufficient evidence that her reduced work hours were attributable to her loss of driving duties, rather than ordinary business fluctuations. Beyond her own bare allegation, she cites only the testimony of Myra Ryan, CWLC's director. But Ryan agreed merely with the fact that Rizzo's hours had decreased, and in fact expressly disagreed with counsel for Rizzo as to *why* that had occurred.

11. *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999).

12. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (quoting *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994)).

13. Of course, our conclusion here — that the removal of driving duties does not alone constitute a constructive demotion (Cont'd)

necessary objective showing of discriminatory demotion through her reduction in duties.

Because neither temporary suspension nor even permanent removal of driving duties alone qualifies as a demotion, and because she did not show any other disability-motivated adverse employment action, Rizzo failed to present a *prima facie* case of liability under the ADA. This court should therefore reverse and render judgment as a matter of law in favor of CWLC.

III.

Not only, however, does the majority look past the absence of an adverse employment action, but it also circumvents the significantly more challenging burden-of-proof issue by concluding that CWLC failed to object as required under FED. R .CIV. P. 51. The majority errs in saying that CWLC did not object and in refusing to address the validity of *Rizzo I* on that ground.

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under *Sharp* — does not affect our view expressed in part III hereof that, for purposes of assigning burden of proof, driving is an essential function of Rizzo's job. The former determination turns on such factors as the level of pay, prestige and challenge of work, and opportunity for career advancement. The latter, by contrast, is simply an employer's good-faith determination of what job functions are essential to a particular position. Thus, a function could be essential to the employer while not commanding extra pay and being devoid of prestige, challenge, or other objective value, the loss of which could constitute a constructive demotion.

More importantly, as we have said, *Rizzo I* was incorrectly decided. Under the proper rule, the *employee*, not the employer, has the burden to prove that he can perform essential job functions safely notwithstanding his disability and does not thereby pose a direct threat to the health or safety of others in the workplace.

Unfortunately, we cannot rely on the text of the ADA to tell us how to assign the burden of proof, because different provisions conflict, and analogies to other federal employment discrimination laws are of limited utility. Nevertheless, under this circuit's pre-*Rizzo I* precedent, we have held that the rule crafted to adjudicate claims under the Rehabilitation Act applies to ADA cases as well.[14] Most persuasive, however, is the fact that the rule urged by the dissent in *Rizzo II* offers the most practical solution to this vexing problem.

A.

To sustain an action under the ADA, an employee first must prove, as part of his *prima facie* case, that he is a "qualified individual with a disability." 42 U.S.C. § 12112(a). In other words, he has the burden to prove that he is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8).[15] In the context of the ADA, ability to perform

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14. *See Rizzo II*, 173 F.3d at 272-73 (Wiener, J., dissenting) (citing *Daugherty v. City of El Paso*, 56 F.3d 695, 697-98 (5th Cir. 1995)).

15. The ADA defers to an employer's determinations of the essential functions of a job. *See* § 12111(8) ("For the purposes of (Cont'd)

an essential function means, *inter alia*, doing so without constituting a direct threat.

Plainly, then, when discharging his burden of establishing the second element of a *prima facie* ADA case — qualification for the job — the plaintiff must show that, in performing each essential function, he does not pose such a threat. Where, as here, the function is (1) driving (2) a van (3) full of pre-school-age children (4) on public streets in a high-traffic urban area, an employee with a disability that has an obvious nexus to performing that job function in a safe manner must negate the threat.

True, the ADA also provides employers with the affirmative defense of showing a direct threat:

> It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.

(Cont'd)
this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.").

§ 12113(a). "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." § 12113(b).

In other words, it is the *employee's* burden to prove that he is a *qualified individual with a disability* (which includes, in some cases, negating direct threat), and it is the *employer's* burden to establish that an employee poses a *direct threat* to the health or safety of other individuals in the workplace. These provisions, however, leave a troubling gap, one that is exposed by the facts of this case: Whose burden is it if, according to the employer, an employee is not a qualified individual because, as a result of his disability, his unsafe performance of an essential job function *renders* him a direct threat to others in the workplace?

On the one hand, imposing the burden on the *employee* requires him to prove that he is not a direct threat — a rule that appears to conflict with § 12113(b), which assigns the burden, completely and without exception, to the employer to prove direct threat, and not to the employee to disprove such a threat. On the other hand, placing the burden on the *employer* requires it to show that the employee cannot perform an essential job function safely — a rule that conflicts with provisions of the ADA that expressly assign the burden to the employee to prove that, as a qualified individual, he can perform all essential job functions.

To place the burden on the employer is to hold — absurdly, in our view — that *unsafe* execution of job duties nevertheless constitutes *adequate* performance. This

approach effectively rewrites the ADA to require an employee merely to prove his ability to "perform the essential functions of the employment position," § 12111(8), *without regard* "to the health or safety of other individuals in the workplace," § 12113(b). As a matter of statutory construction if nothing else, such a rule is untenable.

B.

Because the answer cannot be found in the statutory text, we are licensed to look to other sources for guidance. No obvious solutions appear from simply looking to other federal employment discrimination statutes. Nevertheless, this court has held that the rule governing burden of proof under the Rehabilitation Act applies also to the ADA. *See Daugherty*, 56 F.3d at 697-98. *Rizzo I* therefore is flawed as a matter of *stare decisis*, violating our maxim that one panel cannot overrule another.

1.

In *Rizzo I*, 84 F.3d at 764, the panel held that "[a]n employee who is a direct threat is not a qualified individual with a disability. As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." In other words, the panel placed the burden to prove direct threat on the *employer*, and did so irrespective of whether the danger involves an essential job function — labeling absence of direct threat as a qualifier to be a handicapped employee covered by the ADA, yet impermissibly shifting to the employer the employee's burden of proving his qualification.

This approach mirrors that taken with regard to the *bona fide* occupational qualification defense provided in other federal employment discrimination statutes such as title VII and the ADEA.[16] Under those provisions, the *employer* has the burden to justify the otherwise unlawful discrimination shown by the employee by pleading and proving a business necessity defense.[17] As this circuit has noted with respect to title VII, placing the burden of proof on the employer to defend discriminatory acts on the basis of business necessity is consistent

> with the purpose of the Act — providing a foundation in law for the principle of nondiscrimination. [Otherwise,] the exception will swallow the rule. . . . [T]he principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.[18]

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16. *See* 42 U.S.C. § 2000e-2(e) (title VII); 29 U.S.C. § 623(f) (ADEA).

17. *See Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 232 (5th Cir. 1969) (title VII); *EEOC v. Univ. of Tex. Health Science Ctr.*, 710 F.2d 1091, 1093 (5th Cir. 1983) (ADEA).

18. *Weeks*, 408 F.2d at 235.

The analogy is less than perfect, however. Unlike the ADA, which expressly applies only to "*qualified* individual[s],"[19] title VII and the ADEA broadly protect "*any* individual,"[20] limiting references to an employee's ability to do the job to the provisions governing the *bona fide* occupational qualification defense.

This is not to say that a title VII or ADEA plaintiff is not required, as part of his *prima facie* case, to prove he is qualified. After all, failure to make such a showing constitutes failure to prove discrimination; an employer need merely present inability as the real motive behind the adverse employment action.[21] But the distinction does undermine the analogy between disability discrimination, on the one hand, and age or sex discrimination on the other. It evinces Congressional understanding — not to say common sense — that an employee's ability to do the job, and to do so safely, is a matter of heightened concern when it comes to

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19. *See* 42 U.S.C. § 12112(a) (prohibiting discrimination "against a *qualified* individual with a disability because of the disability of such individual") (emphasis added).

20. *See* 29 U.S.C. § 623(a)(1) (prohibiting discrimination "against any individual . . . because of such individual's age"); 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin").

21. *See, e.g., Sreeram v. Louisiana State Univ. Med. Ctr. — Shreveport*, 188 F.3d 314, 318 (5th Cir. 1999) (holding that plaintiff "failed to establish a prima facie case of sex and/or national origin discrimination because she failed to establish that she was qualified for the position in question at all relevant times").

disability, and has a special meaning not present in the context of age or sex. Any reasonable legal regime that condemns employment discrimination should therefore acknowledge and incorporate this distinction.

2.

A closer analogy might be found in the Rehabilitation Act, which prohibits recipients of federal funding from discriminating against an "otherwise qualified individual with a disability . . . by reason of her or his disability." 29 U.S.C. § 794. Under that statute, "the burden lies with the plaintiff to show that he is otherwise qualified," and he is "otherwise qualified" only if he " 'can perform the essential functions of the position in question without endangering the health and safety of [himself] or others.' "[22]

Even here the analogy is imperfect. Although the protected class — disabled individuals — is the same under both acts, the Rehabilitation Act, unlike the ADA, offers no explicit exception to liability for business necessity or workplace safety, whether as part of the employee's *prima facie* case or as an affirmative defense. The *Chandler* court thus was forced to construct an exception, using the "otherwise qualified" language as its statutory hook:

> Taken literally, "otherwise qualified" could be defined to include those persons who would be

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22. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993) (quoting *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (quoting 29 C.F.R. § 1613.702(f) (1990))).

> able to meet the particular requirements of a particular program "but for" the limitations imposed by their handicaps. The Supreme Court, however, expressly disapproved of such an interpretation because of the absurd results that would be produced. "Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress." The Supreme Court instead defined an otherwise qualified person as "one who is able to meet all of a program's requirements in spite of his handicap."[23]

In light of the scheme of the Rehabilitation Act, which prohibits discrimination against "otherwise qualified" individuals, without discussion of defenses or justifications, it was only natural to place the burden on the plaintiff.

Quite arguably, the ADA shows that Congress learned its lesson from the Rehabilitation Act, for the ADA not only expressly mentions both business necessity and workplace safety, but also lists them as affirmative defenses for employers.[24] As we have discussed, other, conflicting provisions of the ADA prevent us from ending the analysis there. Nevertheless, the very existence of these affirmative

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23. 2 F.3d at 1393 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 407 n.7 (1979)).

24. *See* 42 U.S.C. § 12113(a)-(b).

defense provisions should give some pause before we incorporate the Rehabilitation Act caselaw into our ADA jurisprudence.

3.

This court, however, already has confronted the strengths and weaknesses of analogizing the ADA to the Rehabilitation Act. Perhaps adopting the old adage not to let the perfect be the enemy of the good, we applied the Rehabilitation Act framework for burden of proof to the ADA, and did so before *Rizzo I* was decided.

In *Daugherty*, 56 F.3d at 697, we stated that "[t]he elements of a cause of action at issue in our case . . . are virtually the same under the Rehabilitation Act and the ADA." The *Daugherty* court went on to incorporate explicitly the *Chandler* rule into the ADA:

> In *Chandler*, we [stated that] . . . [a]n otherwise qualified handicapped individual is defined as one who can perform the *essential functions of the position* in question *without endangering the health and safety of the individual or others*. . . . [T]his holding likewise compels us to hold that under the ADA Daugherty is not a qualified individual with a disability for the position of bus driver. This *essential element* of his claim is lacking.

Daugherty thus teaches that an employee's ability to perform essential job functions safely is part of his *prima*

facie case, under the ADA no less than under the Rehabilitation Act. Therefore, the *Rizzo I* panel erred in placing the burden of proof on the employer.

C.

Because the text of the ADA is unyielding and beyond rehabilitation, and analogies to other federal employment discrimination statutes are of little help, courts are left with no choice but to construct a rule that makes the best sense, while adhering as closely as possible to what we can discern Congress would have wanted. As we have seen, an obvious alternative to the rule of *Rizzo I* is to place the burden on the *employee*, as we did in *Daugherty*.[25] That is the approach urged by the dissent in *Rizzo II*[26] and is the law in the First and Eleventh Circuits.[27]

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25. *See Daugherty*, 56 F.3d at 697-98.

26. *See* 173 F.3d at 273 & n.64 (Wiener, J., dissenting).

27. *See EEOC v. Amego*, 110 F.3d 135, 144 (1st Cir. 1997) (stating that "in a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore 'qualified.'-Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others. There may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden."); *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (holding that, where "[e]ach of Moses's assigned tasks presented grave risks to an employee with a seizure disorder," "[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available").

This rule requires the *employee* to disprove that he is a direct threat to others, though only within the context of an *essential* job function. It would still leave it to the *employer* to prove direct threat either where an employee is unable safely to perform a *non-essential* job function, or where his disability only renders him a threat to the workplace generally.[28]

Take this case as an example. Rizzo suffers from a hearing disability that, according to CWLC, renders her unable to drive children safely — one of the essential functions of her job. The disability therefore directly implicates her ability to do that job. Under the rule advocated by the dissent in *Rizzo II*, she, as the *employee*, has the burden to prove she can drive safely.

There is much to be said on principle for this distinction between the ability to perform a particular job function safely, on the one hand, and being a general threat to the health or safety of others in the workplace, on the other hand. It recognizes that we may have special cause for suspicion when an employer justifies discrimination not on the relatively concrete and more readily measurable basis of ability to perform a particular essential job function safely, but because of a proffered generalized concern about health and safety. "Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious

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28. Rizzo must contend that driving a bus is an essential function of her position. If it were not, CWLC could have made an offer "she couldn't refuse" to accommodate her by replacing that non-essential function with other duties.

diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious."[29]

We therefore may have reason to be particularly wary of an employer who asserts generalized rather than job-function-specific justifications. It is reasonable to allocate the burden of proof accordingly and to assume that Congress had *Arline* in mind when it enacted the ADA.[30]

Admittedly, nothing in the text of the direct-threat provision supports this distinction. But this approach does at least preserve some role for § 12113(b), by requiring employers to prove direct threat when the issue does not concern an employee's ability to perform an essential job function.

In conclusion, the rule endorsed by the dissent in *Rizzo II* offers a practical, balanced solution to the problem, one to which the ADA unfortunately has left no answer. By placing the burden on the employee with regard to essential job functions and on the employer for generalized,

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29. *School Bd. v. Arline*, 480 U.S. 273, 284 (1987).

30. *See* Jeffrey A. Van Detta, *"Typhoid Mary" Meets the ADA: A Case Study of the "Direct Threat" Standard Under the Americans with Disabilities Act*, 22 HARV. J.L. & PUB. POL'Y 849, 857-58, 860 (1999) ("The 'direct threat' standard had its genesis in litigation involving employees with contagious diseases under the Rehabilitation Act of 1973 [citing *Arline*]. . . . When Congress considered the legislation that became the ADA, it used Arline as a starting point for grappling with disqualification of employees due to safety risks.").

non-functional health concerns, it enforces the Congressional mandate that unjustifiable discrimination on the basis of disability is intolerable, while recognizing the reality that disability raises legitimate questions of employee qualification unique in employment discrimination law.

By distinguishing between essential job functions on the one hand and other, generalized health and safety concerns on the other, this rule reflects the fact that our most intense suspicions of untoward motivation are triggered when merely generalized concerns, lacking a basis in a concrete, particular essential job function, are put forth to justify discrimination on the basis of disability. Having found the right answer in *Daugherty*, this court ought not to have departed from it in *Rizzo I*.

IV.

The majority says it need not address *Rizzo I* because CWLC failed to file a proper objection. We disagree.

Counsel for CWLC did object. The original instructions directed the jury to place the burden on Rizzo to prove she was a qualified individual with a disability, and the burden on CWLC to prove Rizzo constituted a direct threat to others in the workplace. The instructions further stated, however, that Rizzo would not be a qualified individual with a disability should the jury find that she posed a direct threat to others — as *Rizzo I* itself suggested.[31]

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31. *See Rizzo I*, 84 F.3d at 764 ("An employee who is a direct threat is not a qualified individual with a disability. As with all (Cont'd)

Accordingly, CWLC was concerned — and understandably so — that the repeated reference to direct threat would confuse the jury and mislead it to believe that CWLC not only had to prove direct threat, but also had to disprove Rizzo's qualifications *in toto*, including absence of direct threat. CWLC thus objected and requested a clarification, which the court denied. Having failed to obtain an additional instruction clarifying that Rizzo, and not CWLC, had the burden to prove that she was a qualified individual, CWLC must have found it futile to seek further instruction that Rizzo, and not CWLC, had the burden to prove ability to perform essential job functions safely and in a non-threatening way.

Moreover, CWLC's sense of futility must have been particularly daunting in light of the express language of *Rizzo I*.[32] To be sure, as a general matter FED. R. CIV. P. 51

(Cont'd)
affirmative defenses, the employer bears the burden of proving that the employee is a direct threat."). This statement is itself contradictory: An employee has the burden of proving that he is a "qualified individual," which he cannot be if there exists a direct threat in his performance of an essential function; therefore, at least at that stage, proof of direct threat should not be the employer's burden. Only if the employee establishes a *prima facie* case that includes performing each essential function safely (i.e., no direct threat in the physical performance *per se*) is the employer put in the position of having to advance and prove any affirmative defense, including generalized threats to health and safety from the employee's presence in the workplace.

32. *See Rizzo I*, 84 F.3d at 764 ("As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat.").

provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." But the rule is not without exceptions. "[F]ailure to object may be disregarded if the party's position has previously been made clear to the court and it is plain that a further objection would have been unavailing."[33] For example, where, "[a]t the time of the trial, the prevailing Fifth Circuit rule did not require submission of the requested charge . . . , further objection by the appellants would have been fruitless." *Id.* Objection here would have been similarly fruitless — and thus similarly excused — for we had just recently sent the court direct instructions regarding burden of proof in *Rizzo I*.

Given not only CWLC's request for clarification on the proper scope of each party's burden, but also the binding language of *Rizzo I*, the fundamental purpose of rule 51 — to apprise the court of the legal issues in the case — was amply served here. CWLC's argument therefore was preserved adequately for appeal.

V.

In summary, the ADA is not a paragon of legislative drafting. Particularly impenetrable is the statutory allocation of burden of proof regarding an employee's qualifications and the threat that disabled employees might pose to health

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33. *Lang v. Texas & Pac. Ry.*, 624 F.2d 1275, 1279 (5th Cir. 1980).

and safety. The most realistic and principled resolution of this dispute would have been to reverse and render judgment for CWLC for want of an adverse employment action and to take any appropriate opportunity to address the facially conflicting provisions of the ADA on burden of proof of direct threat. Therefore, we respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 15, 1999

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-50367

VICTORIA RIZZO,

Plaintiff-Appellee,

VERSUS

CHILDREN'S WORLD LEARNING CENTERS, INCORPORATED, doing business as CWLC, Incorporated,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, WIENER and DENNIS, Circuit Judges.

WISDOM, Circuit Judge:

Children's World Learning Center (CWLC) is a school and daycare-provider for young children. Victoria Rizzo is a hearing-impaired woman who, until the circumstances of this lawsuit arose, was an employee of CWLC. In 1993, Ms. Rizzo left CWLC after a substantial change in her employment duties, and shortly thereafter filed a

discrimination claim against CWLC under the Americans with Disabilities Act (ADA) 42 U.S.C. § 12101 et seq. Rizzo asserted that she had been demoted solely because of her hearing impairment. CWLC filed a motion for summary judgment that the district court granted. We reversed the district court and remanded for trial in *Rizzo v. Children's World Learning Centers, Inc.*[1] (*Rizzo I*).

At trial, the jury found that CWLC had discriminated against Rizzo because of her disability, in violation of the ADA. CWLC appeals, asserting the following assignments of error. (1) The district court erred in denying CWLC's motion for judgment as a matter of law, in that Rizzo failed to meet her burden of proof. (2) The district court erred in denying CWLC's motion for judgment as a matter of law, in that defendant CWLC conclusively proved an affirmative defense, specifically that Rizzo posed a "direct threat" to the children in her care. (3) The district court erred in denying CWLC's motion for a new trial, in that the verdict was against the great weight of the evidence. (4) The charge presented to the jury contained plain error, in that it placed the burden of proof on both parties. (5) The award of $100,000 for past and future mental anguish is clearly erroneous, asserting that it is excessive and not supported by competent evidence or causally linked to a violation of the ADA. CWLC seeks either judgment as a matter of law, a new trial, or a reversal as to damages.

Appellee Rizzo now asserts that CWLC's appeal is frivolous and seeks sanctions against the appellant. Further,

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1. 84 F.3d 758 (5th Cir. 1996).

Rizzo seeks attorneys' fees on appeal, should she be found to be the prevailing party.

We affirm the jury verdict and award. We also find this appeal is not frivolous, and therefore not subject to sanctions. We further award attorneys' fees to the appellee in the amount of $20,625.

Facts

The facts of this case are hotly disputed. This dispute led to our reversal of summary judgment in *Rizzo I*. There were genuine material issues of fact that needed to be determined at trial.

Victoria Rizzo was an administrative aid at the Children's World Learning Center. She suffers from a substantial hearing impairment. Among her other duties, Rizzo regularly drove students to and from school in a van provided by CWLC. In 1993, a parent of one of CWLC's students complained that her child had been unable to get Rizzo's attention because of her hearing disability. This parent also voiced a concern that Rizzo's disability might prevent her from hearing a choking child while driving a van full of small children. Shortly after this complaint, Rizzo was removed from her van driving duties. She additionally suffered a reduction in work hours, was forced to work a "split-shift" to make up those lost hours (working two short shifts, one in the early morning, the other in the late afternoon), was assigned to cook meals in the Center's kitchen, and on several occasions worked fewer than the necessary hours to keep her benefits (though her benefits

were never, in fact, revoked). After these changes in her work assignments, Rizzo quit her job at CWLC, and filed suit under the ADA, alleging discrimination due to her hearing disability.

Rizzo contends that the changes in her employment duties constituted a demotion based solely on her disability. CWLC denied this charge, contending that the change in duties was a natural part of a daycare work environment. CWLC further contends that it was necessary to remove Rizzo from her van driving duties because she posed a direct threat to herself and the children in her care. All of these issues were fully litigated before a jury. That jury found CWLC had violated the ADA by discriminating against Rizzo based on her disability; that such discrimination was done with malice; and that Rizzo was entitled to damages in the amount of $100,000 for past and future mental anguish. CWLC timely filed this appeal.

Jurisdiction

The district court had jurisdiction of this federal question litigation under Title I of the Americans with Disabilities Act. 42 U.S.C. § 12101 et seq. This court has jurisdiction over a direct appeal arising from such litigation.

Burden of proof and judgment as a matter of law

We shall address the appellant's first two assignments of error together. CWLC first contends that the district court erred in denying appellant's motion for judgment as a matter of law, asserting that Rizzo failed to meet her burden of proof.

CWLC next contends that the district court erred in denying the motion for judgment as a matter of law in that CWLC conclusively proved that Rizzo posed a "direct threat" to the children in her care, an affirmative defense to an allegation of discrimination.

As these two assignments of error intertwine around the issue of the burden of proof, we shall address them together. The question is twofold: first, did Rizzo pose a direct threat to the children in her care; second, is it CWLC's burden to prove she was a threat, or is it Rizzo's burden to prove she was not? At first glance both the caselaw from the different federal circuits and the federal regulations themselves appear to be in conflict.

CWLC maintains that Rizzo, as a plaintiff, must prove that she is "a qualified individual with a disability," pursuant to 42 U.S.C. § 12112(a). CWLC also maintains that, as part and parcel of proving she is a qualified individual with a disability, Rizzo must prove that she does not pose a direct threat to the health or safety of herself or others. In support of this contention, CWLC points to a holding of the Eleventh Circuit, stating that "the employee retains at all times the burden of persuading the jury . . . that he was not a direct threat."[2] In so holding, the Eleventh Circuit relied upon a provision of the Interpretive Guidance to 29 CFR § 1630.2(r). This states: "An employer may require, as a *qualification standard*, that an individual not pose a direct threat to the health or safety of himself/herself or others" (emphasis

2. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996).

added). As this "qualification standard" obviously goes to the issue of whether plaintiff is a "qualified individual with a disability," the burden of proof would apparently fall on the plaintiff.

Appellee Rizzo responds that CWLC as the defendant bears the burden of proving "direct threat" as an affirmative defense. In support of this position, Rizzo cites our own statement in *Rizzo I*, that "as with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat". Just as the Eleventh Circuit's holding in *Moses* was based on the Interpretive Guidance to the Code of Federal Regulations, so too was our holding in *Rizzo I*. Specifically, that "with regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard." Interpretive Guidance to 29 CFR § 1630.15(b) & (c).[3] Rizzo contends that this is law of the case, and dispositive of the issue of burden of proof. We agree. Further, we find that upon a thorough reading of the caselaw and the regulations, there is, in fact, no conflict at all.

The law of *Rizzo I*, putting the burden of proof on the defendant, applies only in cases concerning "safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities."[4]

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3. See *Rizzo I* at 764.

4. *Id.*

Appendix B

In the instant case, the record reflects that CWLC demoted Rizzo based on what they perceived to be her inability to hear a choking child while driving a van full of children. Upon this Court's observation that there is no evidence that a choking child even makes a sound, CWLC amended its position, now contending that Rizzo's true "direct threat" to the safety of the children lay in her inability to distinguish spoken words and specific sounds. The record is replete with evidence that Rizzo heard the word "death" as "luck," the word "pain" as "chain," and so forth.[5] In other words, the safety requirement instituted by CWLC was that any teacher whose responsibilities included van driving be able to discriminate spoken words. This is obviously a safety requirement which tends to screen out a class of individuals with hearing disabilities. In such a case, the defendant now bears the burden of proof that the employee poses a direct threat to the health or safety of herself or others.[6]

We therefore agree with the Eleventh Circuit that the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others. We disagree with the *Moses* opinion only insofar as that opinion allows for no exceptions to this rule. ("The employee retains

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5. See Defendant's Exhibit 51, p. 55

6. For example, had CWLC instituted a "safety requirement" that any teacher whose responsibilities included van driving also be a state-certified teacher with a minimum of a bachelor's degree in education, the burden in such a case would remain on the plaintiff to prove that she is not a direct threat. It is the nature of the safety requirement itself, and whether it tends to screen out the disabled, that determines if the burden of proof should shift to the defendant.

the burden *at all times . . .*" *Moses* at 447) (emphasis added). We hold that, in accord with the federal regulations, when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat.

Working now with an understanding that, in the case at bar, defendant-appellant CWLC has the burden of proof, we may fully address their assignments of error. Did the district court err in denying the motion for judgment as a matter of law? We view the evidence in the light most favorable to the non-movant, and ask, could a reasonable juror have found for the plaintiff?[7]

To prevail under the ADA, the plaintiff must prove three things: (1) she has a disability; (2) she is an otherwise qualified employee; and (3) she suffered an adverse employment decision solely because of her disability.

Both parties have stipulated that Rizzo suffers a disability.

Was Rizzo an otherwise qualified employee? CWLC contends that Rizzo could not safely drive the school van, and that she was therefore not qualified. We have already established that the burden of proof that Rizzo constituted a direct threat falls on the appellant. Again, the issue is intertwined with CWLC's assertion that it proved, as a matter

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7. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

of law, that Rizzo was a direct threat to others. We disagree. There is no evidence in the record that Rizzo ever had any problems driving the van. There is no evidence of a previous accident, or even a previous near-miss. There is no evidence that her disability resulted in her being distracted from her driving duties. CWLC points out that, as Rizzo would be unable to hear the children in the van, she would have to rely on the additional mirrors placed in the van for visual clues as to the children's safety. CWLC contends that this would tend to distract Rizzo, and could result in an accident. There is no evidence that the mirrors were placed in the van to accommodate Rizzo. These mirrors were there so that *any* van driver, with or without a disability, could check on the children visually. This was a necessary step since it would be enormously difficult for *anyone* to distinguish words in a van filled with up to two dozen children.

With regard to her other duties, there is no evidence Rizzo was not qualified. As an administrative assistant she appears to have completed successfully all her other duties, including answering the telephone, despite her hearing loss. CWLC's only problem with Rizzo appears to have been what they perceived as a potential threat in the area of van driving.

Finally, Rizzo must prove that she suffered an adverse employment decision solely because of her disability. CWLC contends that Rizzo suffered no adverse employment decision. They blame the reduction in Rizzo's work hours on the seasonal nature of daycare work. They point out that other teachers shared in the cooking duties along with Rizzo. They contend that Rizzo's change in duties was based on her own request not to be alone in the classroom with children

for an extended period. In short, CWLC contends that Rizzo was never demoted.

Viewing the evidence in the light most favorable to the appellee, we must disagree. Rizzo's hours were reduced, resulting in lost wages. To compensate for the reduction, Rizzo was forced to work a split-shift of early mornings and late afternoons. Even with the split-shift she was not working enough hours to keep her full benefits package (though we recognize that she never actually lost her benefits). She was removed from her duties as the van driver, and sent to work in the kitchen. The cook replaced her as the van driver. In the light most favorable to Rizzo, a reasonable juror could clearly find she was demoted.

While not conceding a demotion, CWLC argues that, in the alternative, the record will clearly show such a demotion was not based solely on her disability. CWLC re-urges its previous arguments: that the work was seasonal; that everyone cooked; that Rizzo asked not to perform certain duties. Mainly, CWLC asserts that driving the van was not an essential part of Rizzo's duties, so suspending her from van driving was not a demotion based on her disability. We disagree. Rizzo's duties included driving the van every day. We remind CWLC, and all appellants, that a motion for judgment as a matter of law does not require this Court to decide which side has the better of the case. "It is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence."[8] Clearly, a reasonable juror could conclude that driving the van was an essential

8. *Id.*

part of Rizzo's job, and CWLC offers no grounds for her suspension from *that* duty other than her disability.

CWLC's final argument is that this Court should recognize the "unique circumstances" of this case, and adopt an equally unique "balancing test" to fit the facts of the case. CWLC contends that a school and daycare facility must make the protection of the children their primary concern. With that in mind, they propose that this Court determine whether CWLC "properly balanced the need to protect the children in its care and Rizzo's interest in continued employment at the Learning Center".[9] We decline to adopt such a balancing test. We recognize CWLC's interest in protecting the children in their care. We must also recognize that the evidence produced at trial shows only speculation as to the threat that could be posed by an employee with a disability who had been safely doing her job for two years.

Congressional intent with regard to the ADA is clearly spelled out: "To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[10] Had Congress intended this Court to apply a balancing test in evaluating a discrimination claim, the Code of Federal Regulations would have made that plain. Yet CWLC provides us with no statutory authority for the test they propose. As such a test has no basis in either the regulations or the caselaw, and is not mandated by the interests of justice, we decline to adopt such a test.

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9. Appellant's Brief at page 23.

10. 28 U.S.C. § 12101(b)(1).

Appendix B

Having reviewed the record in the light most favorable to Rizzo, we conclude that a reasonable jury could have found for the plaintiff, and affirm the trial court's denial of the amended motion for judgment as a matter of law.

Motion for a new trial

Appellant CWLC alternatively argues that the verdict of liability was against the great weight of the evidence, and that the district judge abused his discretion in denying the motion for a new trial.

The arguments of the parties concerning this assignment of error are identical with those made regarding judgment as a matter of law, and need not be rehashed in detail here. After viewing the evidence in the light most favorable to Rizzo, we cannot conclude that the district judge abused his discretion in denying the motion for a new trial.

The jury charge

As we have noted throughout this opinion, the law regarding the burden of proof on the issue of "direct threat" appears to have been in conflict until now. CWLC now asserts as error that the district court mistakenly assigned the burden of proof of "direct threat" to both parties. CWLC further contends that by doing so, the district court caused substantial prejudice to the parties.

CWLC concedes in their brief that they failed to raise this issue before the district court, and now raise it for the

first time on appeal.[11] Because the error is raised for the first time on appeal, we review for plain error affecting substantial rights of the parties, reversing only if the error would "seriously affect the fairness, integrity, or public reputation of judicial proceedings".[12]

First we examine if there was error in the district court's charge. The district court properly assigned to Rizzo the burden of proving she was a "qualified individual with a disability". In defining that phrase, the court instructed that "the phrase . . . describes a person who, with or without reasonable accommodation, can perform the essential functions of the employment position that the plaintiff holds or desires and who does not pose a 'direct threat' to the health or safety of herself or others".[13]

In the very next charge, the court further instructed the jury that "the defendant has asserted that the plaintiff was removed from driving the school van because her employment as a school van driver posed a 'direct threat' to the health or safety of herself or others. (The court then defined 'direct threat' concluding with the following:) The defendant has the burden to prove by a preponderance of the evidence that a direct threat exists."[14] The instructions, like the caselaw and the regulations, appear to conflict.

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11. Appellant's Brief at page 35.

12. *United States v. Olano*, 507 U.S. 725, 736 (1993).

13. Record at 601.

14. Record at 602.

As we have noted before, however, "few jury charges in cases of complexity will not yield error if pored over, long after the fact, in the quiet of the library — if such an enterprise is to be allowed. It is not."[15] Appellant's failure to raise this issue before the district court leaves CWLC with the demanding standard of an error which would "seriously affect the fairness, integrity, or reputation of judicial proceedings".[16] We find the conflicting charges do not meet this standard. "Reversal for plain error is 'not a run of the mill remedy' and will occur 'only in exceptional circumstances to avoid a miscarriage of justice.' "[17] We find no such exceptional circumstances here.

Damages

Appellant CWLC's final contention is that a damage award of $100,000 for past and future mental anguish is excessive in view of the record. We overturn such an award only upon a finding that the amount awarded is "clearly erroneous".[18]

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15. *Highlands Ins. v. National Union Fire Ins.*, 27 F.3d 1027, 1032 (5th Cir. 1994)

16. *Olano* at 736.

17. *Highlands Ins. v. National Union Fire Ins.* 27 F.3d 1027, 1032 (5th Cir. 1994) quoting *Peveto v. Sears, Roebuck, & Co.* 807 F.2d 486, 489 (5th Cir. 1987).

18. *Hernandez v. M/V Rajaan* 841 F.2d 582, 587, rehearing denied en banc 848 F.2d 498 (5th Cir. 1988).

CWLC suggests that the district court's finding that Rizzo suffered $182 in lost wages is an indication that $100,000 for past and future mental anguish is excessive. The $100,000 award may be generous in relation to the lost wages, yet mental anguish is an actual compensatory damage. We note that the jury, having found CWLC acted with malice, could have further inflicted punitive damages on the appellant, and chose not to do so. In short, we cannot say that an award of $100,000 for mental anguish resulting from malicious discrimination in violation of the ADA is enough to "shock the conscience" of this Court.[19]

Appellee' contentions

Having found in favor of the appellee on both liability and damages, we must now address appellee's contention that CWLC's appeal is frivolous, and should result in sanctions. This appeal is far from frivolous. Rizzo correctly points out that our prior holding in *Rizzo I* stated the law of the case as to certain issues raised again on this appeal. The most notable issue raised concerns the burden of proof of "direct threat". CWLC appears to have relied in good faith on what they felt to be conflicting caselaw from the Eleventh Circuit, and we will not penalize the appellant for bringing this issue before the Court.

As a prevailing party in a suit filed under the ADA, Rizzo is entitled to the attorneys' fees awarded by the district court.[20] Additionally, "a long and consistent line of Fifth

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19. *Smith v. Piedmont Aviation, Inc.* 567 F.2d 290, 292 (5th Cir. 1978).

20. 42 U.S.C. § 12117 and 42 U.S.C. § 2000e-5(k).

Circuit precedent allows awards of attorneys' fees for both trial and appellate work".[21] At oral argument, counsel for Rizzo asserted that each partner had worked 75 hours on this appeal. Counsel further stated that the district court had ordered attorneys' fees in the amount of $175 an hour for senior counsel, and $100 an hour for junior counsel. On that basis, we determine that Rizzo is entitled to attorneys' fees in the amount of $20,625. These fees are to be paid by CWLC.

The judgment of liability and the award of damages are AFFIRMED. Attorneys' fees are awarded in accord with this opinion.

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21. *Norris v. Hartmarx Specialty Stores, Inc.* 913 F.2d 253, 257 (5th Cir. 1990).

Appendix B

WIENER, Circuit Judge, dissenting:

Because I believe that Ms. Rizzo's failure to provide the Children's World Learning Center's, Inc. ("CWLC") with a report from her audiologist demonstrating that she could safely supervise the children entrusted to her care while driving a van constituted a breakdown in the interactive process required under the ADA sufficient to preclude her claims under that Act, I respectfully dissent. Moreover, although I applaud the majority's attempt to reconcile Congress' confusing and at least potentially conflicting commands regarding which party bears the burden of proving whether the plaintiff poses a direct threat to the health or safety of herself or others, I am constrained to disagree. I believe that, consistent with this Circuit's implicit holdings in *Chandler v. City of Dallas*,[1] and *Daugherty v. City of El Paso*,[2] and the First Circuit's explicit holding in *Equal Employment Opportunity Commission v. Amego*,[3] when an employee plaintiff is responsible for ensuring the safety of others entrusted to her care as part of her essential job duties, she bears the initial burden of proving that she can perform those duties in a way that does not endanger others. If she cannot sustain this burden, she cannot show that she is an "otherwise qualified individual with a disability," an indispensable element of her prima facie case.[4]

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1. 2 F.3d 1385 (5th Cir. 1993).

2. 56 F.3d 695 (5th Cir. 1995).

3. 110 F.3d 135 (1st Cir. 1997).

4. As we noted in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (*Rizzo I*), to prevail on her ADA

(Cont'd)

Appendix B

I.

Facts

As the majority opinion sets forth the factual background of this case, I will only briefly revisit that terrain, placing particular emphasis on the CWLC and Rizzo's interaction regarding the need for a report from Rizzo's audiologist certifying that she could safely monitor the children while driving the van. Rizzo began working at CWLC as an assistant teacher in March 1991, instructing four and five year olds. She has a hearing impairment that requires the use of hearing aids, of which she informed CWLC when she first applied for a position. Her duties at CWLC included assisting in the classroom, doing administrative paperwork, and driving children in the CWLC van.

In February 1993, a parent of one of CWLC's students observed an incident in a classroom, in which her son was unable to get Rizzo's attention despite repeatedly yelling her name.[5] The parent complained to CWLC director Myra Ryan about Rizzo's being left alone with children and expressed concern over Rizzo's ability to drive the van safely. When Ryan advised Rizzo of the complaint and discussed it

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(Cont'd)
claim, Rizzo must prove that (1) she has a disability; (2) she was qualified for the job; and (3) an adverse employment decision was made solely because of her disability. *Id.* at 763.

5. This was, in fact, the second complaint by a parent stemming from Rizzo's inability to hear a child who was attempting to get her attention.

with her, Rizzo admitted that she had experienced further hearing loss over the course of her employment with CWLC and was scheduled to see her audiologist. Ryan asked Rizzo whether her hearing loss would prevent her from hearing emergency sirens or a choking child in the back of the van. Rizzo responded that she could hear sirens, but that she did not know if she could hear a choking child. Following this meeting, Ryan temporarily removed Rizzo from her driving responsibilities until Rizzo could provide confirmation from an audiologist that she could (1) hear emergency vehicle sirens, and (2) safely supervise children while driving a van.[6]

In March 1993, Rizzo gave Ryan a report from the audiologist stating that Rizzo could hear emergency vehicles; however, the report failed to address Rizzo's ability to supervise the children while driving the van. Ryan again told Rizzo that CWLC would need confirmation that she could do so safely before again permitting her to drive the children. Ryan then gave Rizzo an "Essential Job Function" list for a teacher (not an administrative assistant) and asked her to have an audiologist evaluate whether she could perform the functions. The list did not specifically mention van driving, but it did state that the employee must be able to assist and supervise the children "in all activities." Moreover, Rizzo was, of course, aware that her ability to drive the van safely was at issue.

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6. Rizzo contends that CWLC's argument that a parent's complaint prompted her removal was fabricated. She bases this assertion on the fact that, in writing a letter to CWLC documenting the incident, the parent described it as occurring in May 1993, rather than in February 1993. Rizzo admits, however, that in her February 1993 conversation with Ryan, after which Ryan removed her from van driving duties, Ryan informed her of the complaint.

Rizzo presented the list not to her audiologist, but to Patricia Cuthirds, an employee of the Texas Rehabilitation Commission, who has no training in audiology. Cuthirds stated that she needed to observe Rizzo at work to determine whether she could perform the functions listed, and Rizzo so informed Ryan. Neither Cuthirds nor an audiologist ever observed Rizzo at work and no further report on Rizzo's ability to hear a choking child or otherwise supervise the children while driving the van was ever sent to CWLC, although there is some disagreement as to why not. CWLC contends that Rizzo purposefully delayed in obtaining the audiologist's on-site evaluation. Cuthirds testified that she was told by Rizzo that she did not want Cuthirds to observe her because she did not want to "rock the boat." Furthermore, CWLC employees testified that they emphasized to Rizzo that she could bring in her audiologist to work to observe her. In contrast, Rizzo testified both that she told Cuthirds "not to worry about" coming to observe her but that she would check into the need to do so, and that Ryan told her that the additional testing "was no longer necessary." Rizzo further testified that (1) she did not know why Ryan would have told her that she no longer needed to get additional testing, and (2) she never asked Ryan why such would be the case or followed up this conversation in any way.

Rizzo resigned from her position with CWLC in May 1993. In the exit interview, Claudia Adame, Ryan's immediate supervisor, asked Rizzo what CWLC could do to keep her with them. Rizzo responded that "nothing could be done" and that her "mind had been made up." She testified at trial that she had determined that, "even if all the tests came back to prove that [she] was qualified," she did not

believe that CWLC would reinstate her driving duties. Rizzo brought the present suit later that month.

II.

Merits

A. *Standard of Review*

We review *de novo* the denial of a motion for judgment as matter of law ("JML"), viewing all evidence in the light most favorable to the non-moving party.[7] The decision to grant JML "is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury."[8]

B. *ADA's Interactive Process*

1. *Statutory Structure*

To understand why I believe Rizzo's claim fails, it is necessary to review the basic outlines of the ADA's statutory framework. Under the Act, the general rule is that an employer shall not "[1] discriminate against [2] a qualified individual with a disability [3] because of the disability . . . ."[9] Addressing these requirements in reverse order, a

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7. *Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 546 (5th Cir. 1994).

8. *In re Letterman Bros. Energy Sec. Litig.*, 799 F.2d 967, 972 (5th Cir. 1986).

9. 42 U.S.C. § 12112(a).

"disability" includes a physical or mental impairment that substantially limits one or more of an individual's major life activities.[10] CWLC grants that Rizzo's hearing impairment constitutes a disability. It is important to note, however, that the ADA requires employers to accommodate limitations, not disabilities.[11] "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[12]

With regard to the second requirement, a qualified individual is one who can perform the essential functions of the job held with or without reasonable accommodation.[13] The ADA, however, permits an employer to impose qualification standards that tend to screen out the disabled so long as those standards are shown to be "job related" and "consistent with business necessity."[14] Such qualifications standards "may include a requirement that an individual shall not pose a *direct threat* to the health or safety of other individuals in the workplace."[15] The Act defines "direct

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10. 42 U.S.C. § 12102(2).

11. *See Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (1996).

12. 29 C.F.R. § 1630.2(j), App. (1995).

13. *See* 29 C.F.R. § 1630.2(m).

14. 42 U.S.C. § 12112(b)(6).

15. 42 U.S.C. § 12113(b) (emphasis added).

threat" as meaning "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[16]

Finally, the ADA defines discrimination as including an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer] . . . ."[17] In general, "it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed."[18] Once the employee makes such a request, "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."[19]

Thus, once an accommodation is properly requested, the responsibility for fashioning a reasonable one is shared between the employee and employer. This is only logical, as an employee will typically have better access to information concerning his limitations and abilities whereas an employer will typically have better access to information

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16. 42 U.S.C. § 12111(3).

17. 42 U.S.C. § 12112(b)(5)(A).

18. 29 C.F.R. § 1630.9, App. (1995).

19. *Taylor*, 93 F.3d at 164 (quoting 29 C.F.R. § 1630.9, App. (1995)).

regarding possible alternative duties or positions available to the disabled employee. Fitting these two halves into a whole, the employer and employee can work together to determine how best to restructure the employee's duties and work place in a manner that accommodates the employee's limitations but does not pose an undue hardship on the employer. If, at the end of this process, the employer fails to provide the disabled employee a reasonable accommodation, it is liable under the ADA.[20] On the other hand, if the *employee* does not participate in the process in good faith, he is precluded from recovering from the employer.[21]

The Act, therefore, (1) requires an employer reasonably to accommodate known limitations stemming from a disability; (2) permits an employer to take into account safety risks posed by such limitations; and (3) envisions an interactive process between the employer and the employee both at the initial stage when the employee must inform the employer of his disability and any limitations stemming therefrom and request an accommodation, and at the reasonable accommodation stage when the employer and employee must work together to determine how best to accommodate such limitations.

2. *Requirement that Employee Participate in ADA's Interactive Process in Good Faith*

As CWLC asserts that it is not liable to Rizzo under the ADA because Rizzo failed to help CWLC determine what,

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20. 42 U.S.C. § 12112(b)(5)(A).

21. *See infra* notes 22-35 and accompanying text.

if any, limitations she experienced as a result of her hearing loss, it is the third aspect of the statutory scheme in which we are interested. In *Taylor v. Principal Financial Group, Inc.*,[22] we considered a situation very similar to that of the present suit. There, an employee brought an ADA claim, in which he asserted that his employer had failed reasonably to accommodate his bipolar disorder mental disability.[23] Although the employee alerted his employer that he suffered a bipolar disorder, he did not identify any limitations that he experienced as a result of the condition.[24] To the contrary, the employee told his supervisor that he was "all right" and that he would be able to meet, and likely exceed, the goals that had been set for him.[25] We held that Taylor could not prevail on his claim,[26] stating that "[w]hen the nature of the disability, resulting limitations, and necessary accommodations are uniquely within the knowledge of the employee and his health-care provider, a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation."[27]

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22. 93 F.3d 155 (5th Cir. 1996).

23. *Id.* at 159.

24. *Id.* at 164.

25. *Id.* at 159-60.

26. *Id.* at 165-66.

27. *Id.* at 165.

Appendix B

The Seventh and Tenth Circuits have similarly held that an employee cannot prevail on his ADA claim if his failure to provide medical information prevented his employer from fashioning a reasonable accommodation. In *Beck v. University of Wisconsin Board of Regents*,[28] the Seventh Circuit confronted an ADA claim by an employee based on her depression.[29] After the employee supplied her employer with a letter from her doctor stating that she "may require some reasonable accommodation so that she does not have a recurrence of this condition [the depression],"[30] the employer requested that the employee sign a release to allow it to obtain further information.[31] The employee, however, neither signed the release nor attended a meeting scheduled to discuss possible accommodations.[32] She subsequently brought suit, asserting that her employer had failed reasonably to accommodate her disabilities. The Seventh Circuit held that, by refusing to sign the medical release form or provide the University with sufficient information about her medical conditions, Beck was responsible for the breakdown in the interactive process envisioned by the ADA and thus could not prevail on her ADA claim.[33]

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28. 75 F.3d 1130 (7th Cir. 1996).

29. *Id.* at 1132-33.

30. *Id.* at 1133.

31. *Id.*

32. *Id.*

33. *Id.* at 1137; *see also Steffes v. Stephan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) ("Because [employee] failed to hold up her

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Employing identical reasoning, the Tenth Circuit held in *Templeton v. Neodata Services, Inc.*[34] that an employee who had refused to provide her employer with certification from her physician that she was physically able to perform the essential duties of her position following an automobile accident in response to the employer's reasonable request for such information was precluded from recovering under the ADA.[35]

3. *Interactive Process and Employer's Legitimate Safety Concerns*

In the present case, CWLC too requested that Rizzo provide them with certification that she could perform a function — safely transporting the children in the van — that Rizzo admits — more accurately, insists — constituted an essential function of her position. The suit, however, diverges somewhat from the above-examined cases in that Rizzo complains not that CWLC failed to reduce or restructure her duties to accommodate limitations she suffers as a result of her hearing loss, but rather that CWLC impermissibly reduced and restructured her duties based on stereotypes and generalizations. Thus, whereas in *Taylor*, *Beck*, and *Templeton*, the question of the employer's liability

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end of the interactive process by clarifying the extent of her medical restrictions, [employer] cannot be held liable for failing to provide reasonable accommodations.").

34. 162 F.3d 617 (10th Cir. 1998).

35. *Id.* at 619.

centered on what the employer had *failed to do*, here the question of CWLC's liability hinges on what CWLC *actually did*.

This is a potentially significant distinction. The ADA does not permit an employer to make adverse employment decisions based solely on the fact that an employee has a disability without determining that the disability affects the employee's ability to perform his essential duties.[36] Generally, then, an employer must investigate before acting — that is, before restructuring the employee's duties in a way that might constitute an adverse employment decision — rather than the reverse, as CWLC did here. Nevertheless, this general rule must give way in a situation in which the employee's job necessarily entails ensuring the safety of others and the employer has reasonable grounds for believing that the employee's disability might jeopardize his ability to perform that safety function adequately.

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36. *See Taylor*, 93 F.3d at 164 (Policy that employers must not presume that disabled employee suffers limitations is "supported by E.E.O.C.'s interpretive guide: employers 'are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals must be determined on an individualized, case by case, basis.' ") (quoting 29 C.F.R. § 1630.5, App. (1995)); *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 515 (2d Cir. 1991) ("An employer obviously may not assume that because a person has a handicap, he or she is unable to function in a given work context. Although the Act forbids discrimination based on stereotypes, an employer is entitled to make employment decisions based on 'actual attributes of the handicap.' ").

Such a result flows not only from the structure of the ADA, but from common sense as well. As stated above, burden of proof issues aside, the ADA permits an employer to require that an employee not pose a direct threat to the health or safety of others that cannot be eliminated by reasonable accommodation.[37] Moreover, although the language of the ADA does not mandate that an employer conduct a pre-termination or pre-duty restructuring investigation, it certainly encourages such investigations by requiring that an employer take no action with regard to a disabled employee based on uneducated generalizations and stereotypes.[38] Indeed, the EEOC advises that "the employer must *determine* whether a reasonable accommodation would . . . eliminate" the direct threat[39] — a determination the employer will often only be able to make after investigating the employee's capabilities and limitations.

It follows that, during the period that such an investigation is being conducted, the employer must be permitted to assign to other employees, for a reasonable period of time, those duties in which the safety of others was entrusted to the (possibly) disabled employee to other employees. If this were not so, the ADA would be requiring an employer to expose itself to potentially massive liability in an effort not to discriminate on the basis of disability.[40] Even more importantly,

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37. *See* 42 U.S.C. § 12113(b).

38. *See supra* note 36.

39. 29 C.F.R. § 1630.2(r), 1630.9, Interp. Guidance (emphasis added).

40. As we have reiterated on several occasions in ADA cases presenting concerns over an employee's ability to drive safely, (Cont'd)

if the ADA did not permit an employer to reassign such duties during the course of a reasonable investigation, it would be placing in harm's way all those whose safety is entrusted to the (possibly) disabled employee. There is no evidence that Congress intended to place an employer in such a Catch-22 situation — either discriminate or endanger your business and the safety of others. To the contrary, the ADA's clearly-announced recognition of an employer's potential safety concerns belies such a result.

Thus, the ADA's complementary policies of prohibiting unjustified discrimination on the basis of disability, requiring employers to rest their employment decisions on the actual capabilities and limitations of their employees, and permitting employers to factor into their decision-making process legitimate safety concerns dictate that an employer be permitted to remove from an employee an essential duty that necessarily places the employee in charge of the health and safety of others while the employer determines whether any threat exists.

I hasten to emphasize that an employer does not have *carte blanche* to take any action with regard to an employee whose alleged disability may pose a risk to the safety of others; the employer must always act reasonably under the

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"[w]oe unto the employer who put such an employee behind a wheel of a vehicle owned by the employer which was involved in a vehicular accident." *Chandler*, 2 F.3d at 1395 (quoting *Collier v. City of Dallas*, 798 F.2d 1410 (1986) (unpublished)). In this case, of course, the danger was not so much to other drivers as to the children entrusted to Rizzo's care.

circumstances. As underscored above, before removing a duty from an employee because of the employee's disability, an employer must have reasonable grounds for suspecting that the employee, in fact, poses a direct threat to the health and safety of others — a fact-intensive inquiry that must be determined on a case-by-case basis. If the employer does not have such grounds, the general rule described above, preventing an employer from taking unjustified adverse employment actions against a disabled employee based on stereotypes and generalizations, applies.[41]

Moreover, an employer must conduct its investigation as quickly as practicable, particularly when, as here, the nature of the job is such that the employee is forced to suffer some hardship in terms of hours or pay as a result of the suspension of some of his duties. The ADA permits an employer to remove a duty from an employee while it conducts a reasonable investigation of safety risks. The ADA, however, prohibits an employer from taking an adverse employment action against an employee based solely on the basis of the employee's disability.[42] Again, whether the employer abuses its right to investigate safety concerns either by impermissibly prolonging the investigation or by unnecessarily and unreasonably rearranging the employee's duties during the investigation, thereby crossing the line between reasonable investigation and adverse employment action, will typically be a question of fact.

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41. *See supra* note 36 and accompanying text.

42. *Rizzo I*, 84 F.3d at 763.

Nevertheless, when an employer acts on a reasonable concern that the employee cannot safely care for those entrusted to him in the course of his duties and removes such duties from the employee while attempting to determine whether he, in fact, poses a direct threat, the employee must cooperate with the employer's investigation — just as the case law tells us that he must cooperate with the employer's efforts to fashion a reasonable accommodation.[43] If the employee fails to cooperate — for example, by refusing to provide the employer with medical information about his condition when the information is uniquely within his control — he cannot recover under the ADA.[44]

4. *Rizzo's Claim*

When I apply these standards to CWLC and Rizzo, it is clear to me that Rizzo's ADA claims are precluded by her failure to provide CWLC with a report from her audiologist that she could safely supervise the children entrusted to her care while driving the van. First, CWLC had reasonable grounds for removing the van-driving duties from Rizzo. It had received not one but two reports that children were unable to get Rizzo's attention even though the children were yelling her name to her.[45] Given the potential risk to the children and others of a driver who might not be able to hear important aural signals or whose attention the children might

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43. *See supra* notes 22-35 and accompanying text.

44. *See id.*

45. *See supra* note 5 and accompanying text.

not be able to get in the case of a safety crisis, CWLC was not unreasonable in seeking to investigate the matter further.[46]

Second, it was not CWLC, but Rizzo, who unreasonably delayed the investigation of the matter. Only Rizzo, in conjunction with her audiologist, could provide the medical information necessary to determine whether she posed a risk to the children.[47] Rizzo, of course, did furnish CWLC with half of the information it requested — a report that she could hear the sirens of emergency vehicles. Although she testified inconsistently regarding the matter, Rizzo asserts that CWLC prevented her from providing them with the information it had requested. More specifically, Rizzo claims that additional testing regarding her ability to supervise the children "was no longer necessary."

As an initial matter, in a situation such as this in which an employer has temporarily removed a duty from an employee because of safety concerns and the information sought by the employer is of the type that is uniquely within

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46. *Cf. Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995) (holding insulin-dependent driver was not otherwise qualified individual with disability under ADA); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) (same under Rehabilitation Act).

47. *See Taylor*, 93 F.3d at 165 ("When the nature of the disability, resulting limitations, and necessary accommodations are uniquely within the knowledge of the employee and his health-care provider, a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation.").

the employee's ability to control, it is far from clear that a single remark to the effect that the employee need not provide the information, made after the employer has admittedly informed the employee that it is just that information that they require to reinstate the removed duty, is sufficient to support a finding that the employer *prevented* the employee from providing the information. Rizzo did not testify that Ryan forbade her from bringing her audiologist to observe her at work. In fact, Rizzo testified that she did not even question Ryan as to why the information was no longer needed.

Nevertheless, it not necessary to decide the issue based on this single breakdown of interaction. Rizzo admits that, in her exit interview, Adame asked what CWLC could do to keep her from quitting. At that point, because of the type of information involved, the burden was on Rizzo to provide CWLC with proof that she could drive the van and supervise the children safely. Accordingly, she — not CWLC — was required to raise the issue of further testing before quitting and seeking to recover for disability discrimination. CWLC reasonably requested specific information to determine whether Rizzo was a direct threat to the safety of the children and, then, at a minimum, reopened the door for her to provide that information at the exit interview. Rizzo, however, chose to leave her position with CWLC because she believed that CWLC would not reinstate her driving duties "even if all the tests came back to prove that [she] was qualified." Her choice forecloses the possibility of recovering under the ADA.

Lastly, within the specific context of temporarily suspending Rizzo's duties to investigate its legitimate safety

concerns, CWLC did not unnecessarily or unreasonably rearrange Rizzo's duties. The majority concludes that there is sufficient evidence to support the jury's conclusion that, by removing Rizzo from van driving duties, thereby reducing her hours, and by assigning her to kitchen duty and split shift, CWLC took an adverse employment action against Rizzo. I would agree were this the typical case presenting no direct threat issue; however, if the ADA permits an employer to reshuffle an employee's duties during a reasonable investigation of its legitimate safety concerns, the employer must be allowed temporarily to take actions that would otherwise constitute adverse employment actions. The issue is not whether the employer took action that negatively affects the employee's status — e.g., reducing his hours or reassigning him to less desirable duties — it is whether the employer unreasonably and unnecessarily took such action.

Rizzo testified that she felt stigmatized by her new duties and split schedule. She admitted, however, that they were duties shared by all CWLC employees to varying degrees and that others also worked split shifts. She further admitted that she told CWLC that she did not want to work with school-aged children. Essentially, her claim that she suffered an adverse employment action, therefore, turns solely on the fact that CWLC required that she not to drive the van until she proved she could do so safely. That, however, is exactly what the ADA permits CWLC to do. Therefore, as a matter of law, CWLC's decision cannot constitute an adverse employment action.

CWLC had reasonable grounds for temporarily removing Rizzo from van-driving duty while it investigated whether

she posed a safety risk to the children or others. CWLC did not treat Rizzo unreasonably during the investigatory period by unnecessarily diminishing her work or pay or assigning her to oppressive duties; and it was not CWLC, but Rizzo, who unnecessarily delayed the investigation. Because Rizzo failed to provide the crucial medical information to CWLC prior to quitting, she is responsible for the breakdown in the interactive process required by the ADA. She is thus precluded from recovering under that Act.

C. *Direct Threat*

CWLC and Rizzo disagree as to which party bears the burden on the direct threat issue. CWLC asserts that Rizzo must show that she does not pose a direct threat to herself or others to prove that she is a qualified individual with disability — as noted earlier, an essential element of her prima facie case.[48] Rizzo counters that, on the contrary, it is CWLC that must prove, as an affirmative defense, that Rizzo constitutes a direct threat.

The statutory text is unclear. It provides that a "*qualified* individual" is one who can "perform the essential functions of [his] position."[49] An employee who cannot fulfill his duties without harming himself or others would seem unable to

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48. *See* 42 U.S.C. § 12112(a); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) ("The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available."), *cert. denied*, 519 U.S. 1118 (1997).

49. *See* 29 C.F.R. § 1630.2(m).

perform the essential functions of his position. Moreover, as pointed out above, the ADA permits an employer to impose "*qualification* standards" that an individual not pose a direct threat to the health or safety of others.[50] The language regarding qualification standards, however, appears in the section of the statute entitled "Defenses,"[51] muddying the waters as to which party bears the burden of proving — or disproving — the direct threat contention.

The majority concludes that not only does our holding in *Rizzo I* that, "[a]s with all affirmative defenses, [CWLC] bears the burden of proving that [Rizzo] is a direct threat"[52] constitute the law of the case, thus deciding the burden of proof issue for the present appeal, but further that the *Rizzo I* holding correctly states the applicable law. The majority attempts to harmonize the ADA's apparently conflicting requirements that both the employer and the employee prove their direct threat contentions and to explain the *Rizzo I* holding with the following framework: Although a plaintiff generally bears the burden of proving that he is not a direct threat to the health and safety of himself and others as part of his prima facie case, when an employer imposes safety standards that tend to screen out individuals with disabilities, the burden of proof on the direct threat issue shifts to the employer.

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50. 42 U.S.C. § 12113(b).

51. *See* 42 U.S.C. § 12113(a).

52. *Rizzo I*, 84 F.3d at 764.

Appendix B

Although I agree that *Rizzo I* likely forecloses the burden of proof issue in this appeal[53] — an issue that, in my opinion, we need not resolve because, as I set forth above, Rizzo's claim fails at another stage of the analysis — I believe that the majority's burden-shifting formula is both incorrect and contrary to our prior case law (at least to our prior case law other than *Rizzo I*). I, therefore, conclude with my thoughts on the matter.

The first difficulty I have with majority's proposed framework is that, when applied, the exception swallows the rule. Although the majority's scheme assigns the burden on the direct threat issue to the plaintiff as a general matter, in practice, the defendant will always bear this burden of proof. This is so because whenever the question whether the employee poses a direct threat to himself or others arises in a case, it will necessarily raise as a concomitant the issue of the employer's safety standards. Under the majority's rubric, the burden of proof will then shift to the employer. In other words, simply by arguing that the employee could not perform his job safely, the employer will be deemed to have imposed a safety standard. Thus, every time the direct threat question actually comes into play, the defendant will be saddled with the burden of proof, and the general (circumvented) rule of allocating that burden to the employee will fade into the background. If, on the other hand, the defendant does not raise a defense based on safety concerns, the direct threat issue will simply lie dormant and the putative allocation of the burden of proof to the employee will be meaningless.

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53. *But see infra* note 64 and accompanying text.

For example, in this case, the majority describes CWLC's safety standard as requiring "any teacher whose responsibilities included van driving to be able to discriminate spoken words." That is certainly one component of CWLC's general requirement that its employees perform their jobs safely; and it is, of course, the component of that general requirement implicated by Rizzo's hearing impairment. As Rizzo claims discrimination on the basis of her hearing impairment and CWLC seeks to defend itself by reference to the safety issue, under the majority's conception, CWLC bears the burden of proof. If, however, CWLC did not attempt to defend itself on the basis of safety concerns, Rizzo would bear the burden on an issue left entirely unaddressed by the parties. Thus, although the majority makes a valiant effort to harmonize the ADA's various requirements, its solution, for all practical purposes (and despite the language of the majority's articulated rule), allocates the burden of proof solely to the defendant.

Second, even if the majority's framework did not always result in assigning the burden to the defendant, it will, if adopted, "lead to the anomalous result that there is a lesser burden of proving qualification on a plaintiff where the job involves the care of others, and necessarily entails risk to others, than when the job does not."[54] Such a result flies in the face of the ADA's initial allocation to the plaintiff of proving that he is qualified for the position and the Act's recognition that the employer can (and should) take into account legitimate safety concerns.

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54. *Amego*, 110 F.3d at 144.

Finally, the majority's burden-shifting scheme conflicts with the (at least implicit) holdings of our pre-*Rizzo I* cases, *Chandler v. City of Dallas*,[55] and *Daugherty v. City of El Paso*,[56] both of which involve the disability discrimination claims of insulin-dependent employee drivers. In *Chandler*, we held that an employee was not an "otherwise qualified" driver under the Rehabilitation Act because of the risk of danger he posed to himself and others.[57] En route to this conclusion, we noted that the Rehabilitation Act's "definition of qualified handicapped individual [ ] includes a personal safety requirement — an otherwise qualified handicapped individual is defined as one who 'can perform the essential functions of the position in question without endangering the health and safety of the individual or others.' "[58] Accordingly, we assigned the burden of proof regarding the safety issue to the plaintiff as part of his prima facie case.

Building on *Chandler*, we similarly held in *Daugherty* that an insulin-dependent diabetic had not met his burden under the ADA to prove that he was an otherwise qualified driver because of the risk he posed to himself and others.[59] In so doing, we noted that, like the Rehabilitation Act, "the

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55. 2 F.3d 1385 (5th Cir. 1993).

56. 56 F.3d 695 (5th Cir. 1995).

57. *Chandler*, 2 F.3d at 1395.

58. *Id.* at 1393 (*quoting Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991)).

59. *Daugherty*, 56 F.3d at 697-98.

ADA by its own terms recognizes [a] safety requirement" as an integral part of its otherwise qualified individual concept.[60]

In neither *Chandler* nor *Daugherty* did we address the specific argument made here by Rizzo that, under the ADA, the employer bears the burden on the direct threat issue because it is an affirmative defense. The First Circuit, however, has. In *Equal Employment Opportunity Commission v. Amego*,[61] the First Circuit concluded that, because the Rehabilitation Act's definition of "qualified individual" specifically addresses the safety issue and because Congress intended the ADA's definition of "qualified individual with a disability" to track closely the definition used in the regulations implementing the Rehabilitation Act:

> [I]t is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore "qualified." Where those essential job functions implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.[62]

I believe that this conclusion is both correct and implicit in *Chandler* and *Daugherty*. By expressly modeling the

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60. *Id.* at 698.

61. 110 F.3d 135 (1st Cir. 1997).

62. *Id.* at 144.

ADA's qualified individual concept after that of the Rehabilitation Act and by defining a qualified individual as an employee who can perform the essential functions of his position, Congress has provided strong evidence that it intended the employee to bear the burden, at least initially, of proving in his prima facie case that he is not a direct threat.

It is at least plausible to advance that an employee bears the burden of proving that, in performing his essential functions, he does not pose a direct threat, but that, if the employee meets this burden, the defendant can still show as an affirmative defense that the employee represents a direct threat in the performance of his non-essential duties.[63] If such were the case, the ADA's various pronouncements concerning the safety issue would not be in tension.[64] It is not, however, necessary to address whether such a reading is correct here because Rizzo insists that van driving was an essential function of her job with CWLC.

In sum, I believe that the majority's attempt to reconcile the ADA's various and confusing provisions addressing the direct threat issue misses the mark, incorrectly allocating the burden of proof to the defendant either in every case in which the direct threat question is actually at issue or at least in every case in which the employee's job involves the care

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63. *See id.* at 143-44.

64. And *Rizzo I*'s holding that CWLC has the burden of proving its affirmative defense would not necessarily foreclose the conclusion that Rizzo is also required to show that she did not pose a direct threat in the performance of her essential duties, including van driving, as part of proving that she is otherwise qualified.

of others. It seems clear to me, though, that such an allocation cannot be squared either with the Act's requirement that the plaintiff show that he is qualified to perform his essential duties or with our prior case law.

III.

Conclusion

Based upon my thorough review of the ADA's structure and the record in this case, I conclude that, because Rizzo failed to provide CWLC with a report from her audiologist showing that she could safely supervise the children while driving the van despite CWLC's reasonable request for such information, Rizzo cannot prevail on her ADA claim. Rizzo's decision to quit her job prior to providing the requested information constituted a break-down in the interactive process required by the ADA for which she was responsible. Moreover, CWLC's temporary reassignment of Rizzo's van driving duties while it investigated its valid safety concerns cannot constitute adverse employment decision — a necessary element of Rizzo's prima facie case. Lastly, I am convinced that, at least as an initial matter, an employee bears the burden of proving that he does not pose a direct threat to the health and safety of others when performing his essential duties. I, therefore, respectfully dissent; I would grant CWLC's request for a JML and reverse the verdict for Rizzo.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION DATED, ENTERED AND FILED MARCH 11, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-94-CA-0417

VICTORIA RIZZO,

Plaintiff,

VS.

CHILDREN'S WORLD LEARNING CENTERS, INC., d/b/a CWLC, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 31, 1997, a jury seated in the above styled and numbered cause entered a verdict in favor of Plaintiff Victoria Rizzo and against Defendant Children's World Learning Centers, Inc. d/b/a CWLC, Inc. The jury found that the Plaintiff Victoria Rizzo was a " 'qualified person' at the time she was removed from driving the defendant's school van" and that the Defendant CWLC, Inc., "discriminated against the plaintiff, Victoria Rizzo." Therefore, pursuant to

Appendix C

42 U.S.C. § 12117, 42 U.S.C. § 1981a and 42 U.S.C. §§ 2000e-5(g),(k), the Court now enters its findings of fact and conclusions of law regarding Plaintiff's back pay and attorneys fees.

BACK PAY

1. Plaintiff transferred to CWLC's Midcrown Center on August 3, 1992.

2. Plaintiff resigned from CWLC, effective May 28, 1993.

3. The incident which precipitated a change in Plaintiff's work duties occurred on February 19, 1993.

4. During the period that Plaintiff was employed at the Midcrown Center, she earned $5.00 per hour.

5. Plaintiff worked an average of 75.22 hours per pay period for the period of time beginning with her transfer to the Midcrown Center through the pay period ending on February 12, 1993.[1] Each pay period is two weeks, therefore, Plaintiff worked an average of 37.61 hours per week. There

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1. The Court calculated the average by combining the actual hours worked for each pay period and any VIP time that Plaintiff took for that period. VIP time is vacation/illness/personal time that is accrued by the employee. In a week when Plaintiff took VIP time, the actual number of hours worked would be lower but the Plaintiff would be paid for the VIP time as if she worked those hours. The Court has concluded that the addition of actual hours and VIP time is an accurate reflection of the time worked for each pay period.

were fourteen pay periods from August 3, 1992, through February 12, 1993.

6. Employee schedules and the number of staff hours needed by CWLC varied from week to week and from season to season. For this reason the Court has elected to consider the average of the entire period that Plaintiff was employed at the Midcrown Center rather than just the month or so preceding the February 19, 1993 change in duties. Taking the average of the fourteen pay periods prior to February 19, 1993 is a more accurate reflection of the variances in schedule experienced by Plaintiff and the other employees at the Midcrown Center.

7. Following the parent's complaint of February 19, 1993, Plaintiff's work schedule was rearranged to eliminate her duties as a van driver.

8. After her schedule was adjusted, Plaintiff worked seven full pay periods from the period including February 19 through the period ending on May 21, 1993. She worked one more full week through May 28, 1993, and took a week of accrued vacation for the second week of the pay period ending June 4, 1993.

9. The Court finds that Plaintiff's hours worked for the pay period ending February 26, 1993, through the period ending May 21, 1993, are as follows:

a. period ending 2/26/93 .... 68.09

b. period ending 3/12/93 .... 62.74

c. period ending 3/26/93 .... 69.34[2]

d. period ending 4/9/93 ..... 68.83

e. period ending 4/23/93 79

f. period ending 5/7/93 ..... 70.66

g. period ending 5/21/93 .... 75.99

10. The total of the difference between Plaintiff's prior average hours and the hours she worked after her change in duties for the time period ending on May 21, 1993, is 36.44 hours.

11. Plaintiff also worked one week from May 24 through May 28, 1993. Plaintiff's hours worked for that week equal or exceed the average weekly hours she worked prior to February 19, 1993.

12. The additional total sum that Plaintiff would have made in wages had her schedule not been rearranged to eliminate her van driving duties is $182.20.

13. Plaintiff is making no claim for wages accruing after the date of her resignation from CWLC, Inc.

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2. Plaintiff took three days off without pay during this period. Had Plaintiff taken paid VIP time for these days off, the Court would have calculated the hours worked as the total of actual hours plus VIP time. The Court sees no difference in adding to the actual hours for this period, to determine the hours worked, the 24 hours Plaintiff was unavailable for work. This makes the calculation equivalent to the calculations for periods when VIP time was taken.

14. Plaintiff is making no claim for medical or other benefits during the period of her employment with CWLC, Inc. or afterward.

15. The Court has discretion to award Plaintiff pre-judgment interest on the amount of back pay awarded as damages. *See Pegues v. Mississippi State Employment Service*, 899 F.2d 1449, 1453 (5th Cir. 1990).

16. The Court has discretion to determine the appropriate method of calculating pre-judgment interest. *See Valdez v. Church's Fried Chicken, Inc.*, 683 F.Supp. 596, 636 (W.D.Tex. 1988); *Davis v. City & County of San Francisco*, 976 F.2d 1536, 1557 (9th Cir. 1993), *vac. in part on other grounds*, 984 F.2d 345 (9th Cir. 1992).

17. There appears to be no generally accepted method for calculating pre-judgment interest on back pay awards. *See Taylor v. Central Pa. Drug & Alcohol Services Corp.*, 890 F.Supp. 360, 368-69 (M.D.Pa. 1995) (detailing various methods adopted by different courts). The Ninth Circuit has suggested that the post-judgment interest rate prescribed in 28 U.S.C. § 1961 is an appropriate measure unless equity requires some other computation. *Davis*, 976 F.2d at 1557 (affirming trial court calculation of interest at 90% of average prime rate on a quarterly basis).

18. The Court finds no special circumstances in the instant case that would require an award of interest based on some other calculation than that prescribed in 28 U.S.C. § 1961. *See Odom v. Frank*, 782 F.Supp. 50, 52 (N.D.Tex. 1991) (applying federal post-judgment rate), *rev. on other*

grounds, 3 F.3d 839 (5th Cir. 1993); *Valdez*, 683 F.Supp. at 636 (using § 1961 T-bill rate); *Hennessy v. Penril Datacomm Networks*, 864 F.Supp. 759, 765 (N.D.Ill. 1994) (holding no equity reason existed to believe statutory rate would not make plaintiff whole), *aff'd in part and rev. in part on other grounds*, 69 F.3d 1344 (7th Cir. 1995).

19. The Court finds that Plaintiff shall receive from Defendant the sum of $182.20 in back pay, plus pre-judgment interest from May 7, 1993[3] to the date of judgment at the rate of 5.67% per annum.

16. The Court finds that Plaintiff is additionally entitled to post-judgment interest at the rate of 5.67% per annum pursuant to 28 U.S.C. § 1961.

ATTORNEYS FEES

The Court now comes to the Plaintiff's Statement and Attached Affidavits Regarding Plaintiff's Reasonable and Necessary Attorney's Fees Incurred, filed February 12, 1997; Defendant's Response, filed February 24, 1997; and Plaintiff's Motion to Strike the Affidavit Testimony of Glen D. Mangum and Malinda A. Gaul, and Reply to Defendant's Response, filed February 27, 1997.

Plaintiff complains that the affidavits of Attorneys Mangum and Gaul should be struck because these persons were not listed as witnesses prior to trial and because their testimony is irrelevant to Plaintiff's request for fees. This

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3. This is the ending date of the last pay period in which Plaintiff worked fewer hours than her pre-incident average.

Court has discretion to strike testimony of witnesses not named in pretrial disclosures. However, in this case, Mangum and Gaul are strictly rebuttal witnesses. Further, the Court is familiar with the practices of both these attorneys and finds that their testimony is both relevant and helpful to the Court in determining the reasonable and necessary attorneys fees to be awarded to Plaintiff in this case. Plaintiff's motion to strike will be denied.

Turning now to the issue of the requested fees and expenses, the Court makes the following findings and conclusions:

1. Plaintiff seeks $71,055.00 as reasonable and necessary attorneys fees and $2,420.72 in costs and expenses.

2. Plaintiff seeks additional estimated attorneys fees if the case is appealed following this Court's ruling.

3. This Court has discretion to award attorneys fees to a prevailing party in a case under the Americans With Disabilities Act (ADA) pursuant to 42 U.S.C. § 12117, 42 U.S.C. § 1981a and 42 U.S.C. §§ 2000e-5(k).

4. The jury found that Plaintiff was a "qualified" person entitled to protection under the ADA, that Defendant CWLC had discriminated against Plaintiff, and that CWLC engaged in discriminatory conduct with malice or with reckless indifference to Plaintiff's rights.

5. The jury awarded Plaintiff $100,000.00 compensatory damages but no punitive damages. This Court has awarded Plaintiff a further $182.20 in back pay.

6. Plaintiff is a prevailing party in the case and may, in the Court's discretion, be awarded attorneys fees. *See E.E.O.C v. Clear Lake Dodge*, 60 F.3d 1146, 1153 n.9 (5th Cir. 1995). Attorneys fees are not automatic for a prevailing party and in some circumstances, should not be awarded at all. *Id.* at 1153, citing *Farrar v. Hobby*, __ U.S. __, __, 113 S.Ct. 566, 575, 121 L.Ed.2d 494 (1992).

7. Attorneys fees must be awarded only for those lawyer hours that are reasonably necessary to adequately prosecute the case. *Id.* at 1154. Fees should not be awarded for time that is "excessive, redundant, or otherwise unnecessary." *Id.* citing *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983).

7. Plaintiff's request for attorneys fees is reviewed under the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). However, the Court need not specifically address each factor.

8. Plaintiff seeks an hourly fee of $225.00 for Robert Thompson and an hourly fee of $165.00 for Jason Thompson.

9. The affidavits of Malinda Gaul and Glen Mangum, two attorneys experienced in civil rights employment law whose practice is well known to this Court, indicate that the customary hourly fee charged in the San Antonio Division of the Western District of Texas for a case such as the one prosecuted by Plaintiff is between $125.00 and $175.00 per hour for an attorney experienced in the employment law field. Further, the Court takes notice that fees awarded in similar cases are also in the $150.00 to $175.00 per hour range for

an experienced employment lawyer. *See Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 552 (5th Cir. 1987) (testimony of customary fee plus award of fees in similar cases satisfies requirement to calculate market value of attorney services).

10. Robert Thompson is an experienced attorney of 20 years, however, there is no indication that his expertise is in the employment law field.

11. Jason Thompson does not dispute CWLC'S contention that he was licensed in November of 1994. Jason Thompson's affidavit did not provide the Court with any information regarding his experience or expertise.

12. Although the some of the legal issues in the instant case were somewhat complex, the Court finds that additional work to properly present the legal issues is better reflected in the number of hours spent researching the law rather than in raising the hourly fee awarded to the attorneys. Therefore, the Court finds that a proper fee for Robert Thompson is $175.00 per hour and a proper fee for Jason Thompson is $100.00 per hour.[4]

13. Plaintiff's counsel argues that the request for fees is justified in part because, as a two person firm, the firm was precluded from other work during the period of this case. The Court disagrees. The progress of the case can be divided into two periods. The case had a normal progression in its

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4. The Court has some reservation about the award of $100.00 per hour for an attorney licensed barely two years, however, this is the amount suggested by CWLC and is not clearly excessive.

initial phase with this Court ultimately granting summary judgment. That judgment was appealed to the Fifth Circuit and reversed. Upon remand to this Court, the case was placed on a fairly short schedule and proceeded to trial, the Court having found that discovery was complete before the appeal to the Fifth Circuit and that the opinion of the appellate court did not mandate additional discovery. However, some previously denied discovery motions[5] were reviewed and some follow-up supplementation was ordered, primarily from the Defendant CWLC.

14. A review of the initial period of the trial up to the date of the Fifth Circuit's remand reveals that long periods of time passed during which no work was expended in this case. For this period, the Court finds that the prosecution of the case would not have prevented the Plaintiff's counsels' firm from accepting and pursuing other work.

15. In the second phase of the case following remand to this Court, the Court finds that again there were periods of no activity. The billing statement shows the work was fairly evenly divided between the two attorneys and would not have absorbed two attorneys' time on an extended basis. Further, counsel's choice to have two attorneys appear at trial is simply counsel's choice. The actual trial of the case and presentation of witnesses was not complex. The issues had already been defined as well as the scope of most of the testimony. There were no complex issues raised in motions in limine or as evidentiary matters. Thus the Court does not

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5. Plaintiff's motion to compel was initially denied as moot due to the granting of summary judgment, however, the motion had also been untimely filed well after the discovery deadline.

believe that the presence of two attorneys at trial was necessary. *See Curtis*, 822 F.2d at 552 (disallowing fees for co-counsel at trial).

16. Plaintiff argues that the favorable result of her case justifies the amount of fees requested. The Court notes that the amount of fees suggested by Plaintiff's counsel is nearly three fourths of the amount of damages awarded. Further, the Supreme Court has recognized that except for certain instances of exceptional success, acknowledgment of favorable results is subsumed in other factors used to calculate a reasonable fee. *Blum v. Stenson*, 465 U.S. 896, 900, 104 S.Ct. 1541, 1549-50, 79 L.Ed.2d 891 (1984). A competent attorney should be able to obtain a favorable result for the client and the fact that he or she does so is not automatically grounds for enhancing an otherwise reasonable fee. Having observed Plaintiff's counsel through out this case and at trial, the Court does not find that counsel possessed any unusually helpful expertise that contributed to an exceptional result for Plaintiff.

17. After careful review of Plaintiff's counsels' billing statement, the Court makes the following adjustments:

a. The entries for receiving and reviewing Defendant's Response to Plaintiff's motion for protective order listed on 12/28/96 and 1/2/97 are duplicative. Counsels' fee will be reduced .25 hours at $100.00.

b. The entries for drafting Plaintiff's motion to supplement listed on 12/30/96 and 12/18/96 also

appear to be duplicative. Counsels' fee will be reduced 1 hour at $100.00.

c. Each of Plaintiff's counsel has claimed 8 hours per day during the trial on 1/21/97, 1/22/97, and 1/30/97. Because the Court has found that the presence of only one attorney at trial was necessary, the Court will reduce the hours of each counsel to four hours for each day. For the partial trial day on 2/4/97, the Court will reduce each of counsel's hours from 4 hours to 2 hours.

16. The Court finds that the total amount of hours reasonably expended by Robert Thompson is 181.13 at $175.00 for a total fee of $31,697.75. The Court finds that the total amount of hours reasonably expended by Jason Thompson is 131.55 at $100.00 for a total fee of $13,155.00.

17. The Court finds that Plaintiff should be awarded attorneys fees in the amount of $44,852.75.

18. As to expenses, the Court notes that Plaintiff has included an expert consultant fee of $1000.00 for Rex Moses. No explanation has been given for what expert advice or service this expert rendered. No resume or curriculum vitae has been provided to indicate that the person is in fact an expert or his field of expertise. No attempt has been made to provide a bill from Moses that would clarify what he did for Plaintiff or how much time he expended. Further, the Court notes that Plaintiff made an untimely attempt to name Moses as an expert witness at trial which was denied. Because the Court has no grounds on which to determine that the expense

claimed for Rex Moses is reasonable or necessary, the Court will disallow that expense. *See Curtis*, 822 F.2d at 551.

19. The Court finds that Plaintiff should be awarded $1420.75 as costs and expenses.

20. The Court will not award attorneys fees at this time for estimated expenses of defending against a possible appeal to the Fifth Circuit or the United States Supreme Court. The necessity of such fees is more appropriately presented to those courts should Plaintiff prevail against any challenge.

CONCLUSION

The Court finds that Plaintiff should be awarded $182.20 as compensatory damages for back pay, plus pre- and post-judgment interest at the statutory rate of 5.67% per annum as indicated previously herein. The Court further finds that Plaintiff should recover $44,852.75 as attorneys' fees and $1420.75 for expenses and costs.

Accordingly, it is hereby ORDERED Plaintiff's Motion to Strike the Affidavit Testimony of Glen D. Mangum and Malinda A. Gaul is DENIED.

It is further ORDERED that the judgment shall reflect an award against Defendant and in favor of Plaintiff in the amount of $182.20 as compensatory damages for back pay and in the amount of $46,273.50 in attorneys fees, expenses and costs of Court.

Appendix C

SIGNED and ENTERED this 11th day of March 1997.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-94-CA-0417

VICTORIA RIZZO,

Plaintiff,

VS.

CHILDREN'S WORLD LEARNING CENTERS, INC.,
d/b/a CWLC, INC.,

Defendant.

JUDGMENT

In accordance with the jury verdicts returned on January 31, 1997, and February 6, 1997; and the Findings of Fact and Conclusions of Law entered by this Court on this same date, it is hereby ORDERED, ADJUDGED AND DECREED that JUDGMENT is GRANTED against the Defendant, Children's World Learning Centers, Inc., d/b/a/ CWLC, Inc., and in favor of Plaintiff, Victoria Rizzo, in the amount of one hundred thousand one hundred eighty two and 20/100 dollars ($100,182.20).

It is further ORDERED, ADJUDGED AND DECREED that pre-judgment interest is also GRANTED, and shall accrue on the amount of $182.20 from May 7, 1993, through the date of judgment at the rate of 5.67% per annum.

Appendix C

It is further ORDERED, ADJUDGED AND DECREED that, pursuant to 28 U.S.C. § 1961, post-judgment interest is GRANTED and shall accrue on the Judgment at the rate of 5.67% per annum.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover from Defendant the amount of $46,273.50 in attorneys fees, expenses and costs of Court.

SIGNED and ENTERED this 11th day of March 1997.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX D — REGULATION INVOLVED

29 C.F.R. Pt. 1630(r)

Appendix to Part 1630 — Interpretive Guidance on Title I of the Americans with Disabilities Act

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific

behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Such consideration must rely on objective, factual evidence — not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes — about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to

the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56; House Labor Report at 73-74; House Judiciary Report at 45. See also Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir.1982).